85-1502

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA,

vs.

THEODORE MURPHY (Appellant in 84-1594),
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

I. Whether the evidence was legally insufficient to prove the single conspiracy charged in the indictments but, instead, proved the existence of multiple conspiracies which would entitle Petitioner to a judgment of acquittal?

II. Whether Petitioner was either deprived of a fair trial or incorrectly denied a severance under Rule 14, F. R. Crim. P., when the trial judge allowed the government to introduce against him through live witnesses and tape recordings statements of co-conspirators made after Appellant withdrew from the conspiracy?

III. Whether Petitioner was denied a fair trial when the trial judge permitted the government to introduce tape recordings containing conversations of co-conspirators not in furtherance of and during the course of the conspiracy and which were unduly prejudicial to Petitioner?

IV. Whether Petitioner was deprived of his Sixth Amendment confrontation rights as a result of the introduction of co-conspirator statements after the date the Petitioner withdrew from the conspiracy?

Parties

Rule 28.1 Statement

The United States Court of Appeals for the Third Circuit Caption is:

United States of America,

vs.

Joseph DePeri (Appellant in 84-1566); James Martin (Appellant in 84-1571); Dennis Linso (Appellant in 84-1577); George Morrell (Appellant in 84-1578); Henry Pecic (Appellant in 84-1579); Theodore Murphy (Appellant in 84-1594); and George Katz (Appellant in 84-1599),

Petitioners.

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RULE.

Rule 8(B), Fed. R. Crim. P. 16

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October Term, 1985

No._____

UNITED STATES OF AMERICA,

vs.

THEODORE MURPHY (Appellant in 84-1594),
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner hereby requests that this Court issue a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Third Circuit. Entered on December 6, 1985.

Opinions Below

The Opinion of the united States Court of Appeals for the Third Circuit, is reprinted as Appendixes A, B, C, pp. 1a-47a.

(*United States of America vs. DePeri, Joseph et al.*; Nos. 84-1566; 84-1571; 84-1577; 84-1578; 84-1579; 84-1594; 84-1599. *Theodore Murphy, Appellant in 84-1594).* Filed December 6, 1985, Order amending Opinion filed December 13, 1985. *United States of America vs. DePeri, et al.*, 778 F.2nd 963 (3rd Cir. 1985).

The Opinion of the United States District Court, Eastern District of Pennsylvania (*U.S.A. vs. James Martin, et al., Criminal Action No. 84-106-01-07)* is reprinted as Appendix D, pp. 48a-86a.

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit was entered in this Action on December 6, 1985.

Petitioner's Petition for Rehearing *En Banc* was denied by the United States Court of Appeals for the Third Circuit on January 9, 1986.

The Jurisdiction of this Court is invoked pursuant to 28 USC 1254 (1).

Statutes and Authorities Involved

The Statutes involved in this petition include statutes pertaining to Racketeer Influenced and corrupt Organization "RICO", being 18 U.S.C. §1961 "Definitions"; 18 U.S.C. §1962 "Prohibited racketeering Activities; and 18 U.S.C. §1951 Hobbs Act.

The pertinent statutes provide in full as follows:

18 U.S.C. 1951

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. 1961

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894

(relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29 United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal of interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such inome, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issues, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

Statement of the Case

Petitioner, Theodore Murphy, and six co-defendants, all of whom were officers in various ranking order of the Philadelphia Police Department, were charged with offenses in violation of the RICO statute, 18 U.S.C. 1962(c), by conducting and participating in the affairs of an "enterprise", the Philadelphia Police Department, through a pattern of racketeering activity as defined in 18 U.S.C. 1961, by committing multiple acts of extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951. Essentially, the defendants were charged with conspiring with each other and others to extort money from vendors and video poker machines through use of their official positions in exchange for protection of these machines, which were illegally operated in the Philadelphia area.

After trial by jury from July 9, 1984 through August 10, 1984 before the United States District Court for the Eastern District of Pennsylvania (Huyett, *J.*), verdicts of guilty on numerous counts were returned against all defendants.

A. The Indictments

The first indictment returned by the grand jury on March 8, 1984 named thirteen (13) defendants, all of whom were members or former members of the Philadelphia Police Department. Petitioner, Murphy, was transferred to vice in the Southwest Division in May 1981, after twenty-three (23) years. Petitioner, Murphy, was a vice lieutenant in the Southwest Division until his retirement on November 11, 1982.

Count One of the first indictment charged that from January 1980 through September 1983, the defendants used the Philadelphia Police Department as the RICO

"enterprise" through which they extorted money from the vendors. The Philadelphia Police Department is organized into nine (9) geographic divisions, each of which is comprised of two (2) districts. The department is headed by a police commissioner and two (2) Deputy commissioners. Each division is headed by an inspector; each district is headed by captains. Each division has a vice squad comprised of four (4) plainclothes officers, headed by a lieutenant. Petitioner, Murphy, was lieutenant of vice for the Southwest Division during the period pertinent to the indictment. The vice squads were responsible for the investigation of violations relating to the video poker machines.

Count Two of the first indictment charged that the defendants and the unindicted co-conspirators violated 18 U.S.C. 1962(c), a substantive RICO offense, by using the "enterprise" for a pattern of racketeering activity, that is, multiple acts of extortion in violation of the Hobbs Act. Count Two lists each act of racketeering activity. Petitioner, Murphy, was named as engaging in eight (8) racketeering acts from May 1982 through November or December 1982.

Count Three, which was dropped from the superseding indictment, charged the defendants with conspiring to violate the Hobbs Act. Counts Four through Fifty-Seven charged substantive violations of the Hobbs Act. Petitioner, Murphy, was charged in eight (8) counts.

The superseding indictment included all thirteen (13) defendants and added two of the highest ranking officers of the Philadelphia Police Department, Deputy Commissioner, James Martin, and Chief Inspector, Joseph DePeri.

Counts One and Two of the superseding indictment charged essentially the same acts against Petitioner, Murphy, as the first indictment. However, the superseding indictment extended the time period of the conspiracy to April 1984, rather than September 1983, as alleged in the first indictment. The sole basis for this change related to the activities of Martin and DePeri after January 1984, when a new Mayor and new Police Commissioner, Sambor, began their administration. Under Commissioner Sambor, the Major Investigation Division (M.I.D.) was created to centralize control over specific areas of investigation including vice.

Counts Three through Five charged defendant Martin with obstructing a criminal investigation. Count Six charged defendant DePeri with obstructing justice. Count Seven charged defendant Martin with being an accessory after the fact to obstruction of justice. Counts Eight through Eighty-Six charged substantive violations of the Hobbs Act against each defendant. Petitioner, Murphy, was charged in Counts Forty through Forty-Seven with acts of extortions from May or June, 1982 through November, 1982.

B. Trial

The court ordered that the defendants be tried in two (2) separate trials. Defendants Martin, DePeri, Linso, Pecic, Murphy, Katz and Morrell were tried first. Petitioner, Murphy moved to be severed from his co-defendants on several occasions, but his requests were denied.

There were approximately eighteen (18) bar owners, vendors and video poker machines and numbers writers who testified to making payments to the defendants for protection of their machines. The chief prosecution

witnesses, however, were Joseph Alvaro and Albert Ricci, both former officers who detailed how defendants Martin and DePeri schemed to extort payments and bribes through the vice squads. Neither of these chief witnesses implicated Petitioner, Murphy.

The evidence against appellant, Murphy, consisted of the testimony of six (6) vendors and one (1) bar owner who said that they paid Petitioner, Murphy, for protection of their machines. The vendors, Cardoncik, Freidberg, Adams, Engel, Shervin and DeVore, and the bar owner, Jackmon, each testified that they would get a message to call Lieutenant Murphy and that they arranged with Murphy to make payments. None of these witnesses testified that any other police officer referred them to Petitioner, Murphy, nor did Murphy refer them to any other police officer. The government tried to connect Murphy and Alvaro, a vice lieutenant in the Northwest who testified for the government at trial. However, Alvaro testified that Murphy called him to ask if a particular (unidentified) vendor was "okay". Alvaro said he understood that to mean ... "was I (Alvaro) getting money from this vendor". Alvaro answered that he had gotten money from this vendor and that was the end of the conversation. Alvaro did not refer the vendor to Murphy, nor did he tell Murphy that he could also get money from the vendor.

The government also introduced testimony of three (3) other vendors, one (1) manager and one (1) owner of a bar. None of these witnesses testified to paying Petitioner, Murphy, any money. Dawley, a vendor, testified that he was already paying John DeBenedetto, an officer in the Central Police District, and an unindicted co-conspirator, for the machines in Murphy's district. McGee, a bar manager, testified that one of her vendors (Laskin) left envelopes to give to an officer

"Murray". Laskin, a vendor, testified that he gave Cora McGee money to pay to a police officer, but he did not know whether or not the money went to Petitioner, Murphy. Russell, a bar owner, testified that DeVore left envelopes at his bar which he gave to his waitresses to give to Petitioner, Murphy. Russell never gave Murphy an envelope, nor did he ever speak to Murphy. LaSorsa, a vendor testified that Jackmon told him he had paid appellant, Murphy, for protection, but LaSorsa never paid Murphy himself.

The testimony of the chief prosecution witnesses, Joseph Alvaro and Albert Ricci, consisted of three (3) days and Two Hundred Ten (210) pages of testimony. Neither witness implicated Petitioner, Murphy. The most damaging evidence offered by the government was in the form of tape recordings of conversations made by Alvaro with Ricci, James Martin, Joseph DePeri, Dennis Linso and Stephen Komada. These recordings were all made after November 11, 1982, the date on which Petitioner, Murphy, resigned from the police department. The recordings established that in January 1984, defendant Martin became Deputy Commissioner of the Northwest Division. The tapes showed that Martin used the new Major Investigations Division to extort payments from vice figures in order to pay Albert Ricci and influence him against cooperating with the F.B.I. in its probe of vice activities. The evidence on the tapes against Martin and the other co-defendants was overwhelming. Albert Ricci acknowledged, on tape, his extorting $10,000.00 each month and paying Alvaro and Martin.

The cumulative effect of these tape recordings, which did not contain a shred of evidence against, Petitioner, Murphy, and the co-conspirators hearsay which occurred

after Murphy resigned from the police force, along with other issues, formed the basis for Petitioner, Murphy's Appeal.

The United States Court of Appeals for the Third Circuit by Order of December, 1985 affirmed the Judgment of the District Court.

Petitioner's Petition for Rehearing was denied on January 9, 1986.

REASONS FOR GRANTING THE WRIT

Introduction

The Order and Opinion of the United States Court of Appeals for the Third Circuit should be reviewed by this Court because its decision denying Petitioner's claims that the evidence at trial did not prove a "single conspiracy" but, instead, proved various other conspiracies or criminal acts; and by ruling that Petitioner was not prejudiced by a denial of his motions for severance of trial, is in conflict with other Circuits and is a faulty application of Federal Law.

Further, the Court of Appeals for the Third Circuit's ruling that the admissibility of tape recorded statements made by co-defendants was proper and did not prejudice Petitioner nor deprive him of his Sixth Amendment Constitutional Rights constituted a sanctioning of a departure from Federal Law as to call for an exercise of this Court's supervision.

ARGUMENT

Before trial Petitioner moved the district court to dismiss the indictment on the ground that Count One charged multiple conspiracies in a single count. He also moved for a severance on the ground that since the facts alleged in the indictment amount to multiple conspiracies. He had been misjoined under Rule 8(B), Fed. R. Crim. P. The district court denied both motions.

Count one charged a conspiracy from January, 1980 through April, 1984, to violate RICO; that is, the named defendants, named unindicted co-conspirators and others, being persons employed by and associated with the Philadelphia Police Department, did conspire together to violate Section 1962(c), by conducting and

participating in the affairs of an "enterprise", the Philadelphia Police Department: through a pattern of racketeering activity consisting of multiple acts of extortion under color of official right and bribery.

The central question implicit in the use of an "enterprise" of an organization like the Philadelphia Police Department, which employs thousands of police officers, is whether the named defendants and co-conspirators entered into a single conspiracy together as alleged in the indictment.

Under subsections (c) and (d), the Government must prove beyond a reasonable doubt that an "enterprise" did in fact exist, and that the individual defendants knowingly agreed to participate in the "enterprise" through a pattern of racketeering. Under Section 1961(4), "enterprise" can include a legal entity, or any union or group of individuals associated in fact although not a legal entity.

In this case, the Government chose in the indictment to use the "legal entity" provision of Section 1961(4) and named the Police Department of the City of Philadelphia as the "enterprise".

An enterprise may include "any union or group of individuals associated in fact although not a legal entity". The Supreme Court has held that a completely illegal organization may be an enterprise for RICO purposes. *United States v. Turkette*, 452 U.S. 576 (1981). See also *United States v. Riccobene*, 709 F.2d 214 (3rd Cir. 1983).

It is important to focus on the "illegal" enterprise concept because it highlights the inadequacy of the Government's theory and method of charging in the present case. *Turkette, supra*, sets forth, and *Ricccobene*,

supra, applied, a definition of "illegal enterprise" for RICO purposes. Such an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the *various associates function as a continuing unit. Turkette*, 452 U.S. at 583. The Government chose, apparently for evidentiary purposes, not to make the enterprise a group of police officers associated in fact to commit extortion or bribery. However, the use of a legal entity, as opposed to an illegal one, automatically raises the question under RICO as to whether all defendants are sufficiently "associated" under the law to be properly charged as being involved in a single conspiracy.

In *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), the enterprise described was the Municipal Court of the City of El Paso. The conspiracy centered around Sutherland, who was a judge of the Municipal Court. The other two defendants, Maynard and Walker, agreed to collect traffic tickets from friends along with fines and a $10.00 premium. The tickets would be delivered to Sutherland, who would have the cases transferred to his docket. The cases would be disposed of favorably and the premium split between Sutherland and the defendant who collected and delivered the ticket. Similar to the instant case, the indictment framed the conspiracy as a single agreement among all three defendants. The Government at trial did not attempt to prove any agreement between Walker and Maynard, and thus two unrelated conspiracies affecting the enterprise were proven constituting a variance. The court ultimately held, citing *Kotteakos v. United States*, 328 U.S. 750 (1956), a material variance between the indictment and the Government's evidence had been created by the Government's proof of multiple conspiracies under an indictment alleging a single conspiracy. As the court said

in *Sutherland*, at p. 1193, "what was necessary to constitute a single conspiracy was . . . an agreement among all of the conspirators". See also *United States v. Bright*, 620 F.2d 804, 834-5 (5th Cir. 1980).

The court in *Sutherland* did not reverse the convictions because the variance was not fatal since it did not affect the substantial rights of the defendants. The danger of transference of guilt from one conspiracy to another was not large. However, where the size and complexity of the conspiracies increase, *Kotteakos* is applicable. Again, *Sutherland* contains language at p. 1195 pertinent here:

> "In *Kotteakos*, by contrast, the Court did find that the defendants had been sufficiently prejudiced to justify reversal. In reaching this decision, the Court emphasized the *size and complexity of the Kotteakos conspiracies:*
>
> On the face of things it is one thing to hold harmless the admission of evidence which took place in the *Berger* case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but *eight separate ones were proved, involving at the outset thirty-two defendants.*
>
> 328 U.S. at 766, 66 S.Ct. at 1248-49. It was this fact that made the joint trial in *Kotteakos* so serious an error and distinguished it from *Berger*: '*The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation*'.
>
> *Id.* This does not mean, however, that the proper analysis should hinge on numbers alone. A more fundamental distinction between *Kotteakos* and *Berger* can be found in the Court's treatment in *Kotteakos* of the reasons for prohibition of material variances. When the government tries multiple conspiracies under a single count, an important

> right is at stake in addition to those cited in *Berger: 'the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others'*. 328 U.S. at 775, 66 S.Ct. at 1252-53. Prejudice occurred in the *Kotteakos* trial not because of the number of defendants or conspiracies per se, but because of '[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise . . .' 328 U.S. at 774, 66 S.Ct. 25 1252". (footnote omitted) (Emphasis supplied).

The Major Investigations Division of the Philadelphia Police Department was formed in January, 1984, after Martin became Deputy Commissioner under the new police Commissioner appointed in Philadelphia, Gregory Sambor. Martin headed this division which was formed in wake of the federal grand jury investigation of the police department. The tape recordings made by Alvaro with Martin showed that Martin would use the M.I.D., which had consolidated jurisdiction over vice activities in Philadelphia, to raise money from gambling figures to pay legal fees for Albert Ricci and Martin's close associates and also to pay for their silence. Martin in fact paid or caused to be paid money to Ricci and Alvaro in 1984. For these acts Martin was convicted of obstruction of justice and investigations. These offenses were included in Count One as part of the single RICO conspiracy and evidence relating to them spilled over to the other defendants.

These acts of Martin were not part of a common scheme involving the other defendants. The evidence against them consisted of testimony of vendors and Ricci and Alvaro concerning extortion under color of official right and bribes. The creation of the M.I.D. in 1984 and Martin's activities as its leader radically changed this case into two separate conspiracies. There was no

similarity of method and result or partial overlap of participants in 1984. Martin alone, as a desperate man who saw his career about to be ruined by the investigation of the Federal Bureau of Investigation, caused these obstruction acts to take place in 1984. Three defendants were not even members of the police department in 1984. No evidence of extortion or bribery extending into 1984 was introduced against them. In a real sense, the other defendants were the victims of Martin's "other conspiracy" because the tape recordings made with Alvaro were so damaging that no jury could possibly consider their cases without being influenced by the tapes. Under the charge of the court, Martin's conversations recorded by Alvaro in 1984 were co-conspirator statements that could be used against the defendants since the obstruction acts were part of the Count One RICO conspiracy.

Consequently, the evidence did not amount to a common scheme or conspiracy. At best it showed the existence of a group of officers who individually and with others in their division or district were extorting under color of official right and receiving bribes. Consequently, the several or multiple conspiracies were proven. Under these circumstances, Petitioner, Murphy, was entitled to a judgment of acquittal in the district court and/or a severance.

In the superseding indictment, the grand jury alleged that the RICO conspiracy described in Count One ran from January, 1980 to April, 1984. The RICO "enterprise" was the Philadelphia Police Department. The defendants were charged with agreeing to conduct and participate in the conduct of the affairs of the "enterprise" through a pattern of racketeering activity, which consisted essentially of extortion and bribery.

Petitioner. Murphy, resigned from the police department, or "enterprise", on November 11, 1982. When an officer resigns from the police department, this fact is communicated by computer or teletype to all police districts through the City of Philadelphia. Under these facts, appellant established his withdrawal from the conspiracy as a matter of law. Co-conspirator declarations introduced through the testimony of government witnesses Albert Ricci and Joseph Alvaro and the tape recordings made with the consent of Alvaro, all made after the date Petitioner no longer was a member of the conspiracy, were not admissible against him. The Court granted the defense a continuing objection to the admissibility of all such statements. Thus, the district court should have either ruled this evidence inadmissible at a joint trial, granted Petitioner, Murphy, a severance or at least instructed the jury not to consider such evidence against Murphy.

In *United States vs. Gibbs*, 739 F.2d 838, 845 (3d Cir. 1984), the court states as follows

> "This Court has held that once the government establishes a defendant's involvement in an ongoing conspiracy, the burden shifts to the defendant to prove by, affirmative acts *inconsistent with the object of the conspiracy that he withdrew.*" (emphasis added).

In *United States vs. Steele*, 685 F.2d 793, 803-04 (3rd Cir.), *cert. denied*, 103 S. Ct. 213 (1982), where the defendant was charged with bribery of Puerto Rican officials, through his employment with General Electric, the court found that the defendant's resignation from his employment constituted withdrawal from the conspiracy as a matter of law.

Thus, once the defendant established that he had officially resigned from the police force, or the "enterprise", the burden shifted to the prosecution to rebut by showing some conduct in furtherance of the conspiracy. *United States vs. Lowell*, 649 F.2d 950 (3rd Cir. 1981).

Under these authorities, defendant has met his burden of establishing withdrawal as a matter of law. The *object* of a RICO conspiracy is an agreement to conduct or participate in the conduct of an enterprise's activities through the commission of a pattern of racketeering activity, alone. *United States vs. Riccobene*, 709 F.2d 214, 224 (3rd Cir. 1983). "The gravamen of a section 1962(d) RICO offense is not a conspiracy to commit bribery or some other predicate offense, but a conspiracy to operate or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity." *United States vs. Jannotti*, 729 F.2d 213, 230 (3rd Cir. 1984). Here, the enterprise was the Philadelphia Police Department. The object of the conspiracy as described in the indictment was to conduct or participate in the affairs of the police department through the commission of violations of the Hobbs Act or the State bribery statute. Given this object, resignation from the police department or "enterprise" is a classic act of withdrawal. It is an affirmative act evidencing that defendant would no longer participate in the affairs of the police department and no longer had the power to enforce the promises of protection.

The only evidence offered by the government in rebuttal of Murphy's withdrawal was the testimony of one vendor, Nathan Engel. Engel said that Murphy called him after he read about Murphy's retirement in the newspaper and told him that he would continue to

collect his money. Knowing that Murphy retired and had no power to protect his machines, Engel told Murphy that he would not pay, and, in fact, did not make any payments to Murphy after November 11, 1982. This is proof that Murphy had communicated his withdrawal from the conspiracy and, in fact, had no power to further the conspiracy and was incapable of furthering the conspiracy by extortion. The government failed to meet its burden of proving that the conspiracy was, in fact, furthered by this conversation.

The court erred in not granting Petitioner's requests for severance. The cumulative effect of the taped evidence was of such enormous impact that the jury was unavoidably prejudiced and tainted against Petitioner. For these reasons, appellant was denied a fair trial and his convictions must be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Sur Petition for Rehearing of the United States Court for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1566, 84-1571, 84-1577, 84-1578,
84-1579, 84-1594, 84-1599

UNITED STATES OF AMERICA

vs.

DE PERI, JOSEPH

Joseph DePeri, Appellant in 84-1566

UNITED STATES OF AMERICA

vs.

MARTIN, JAMES

James Martin, Appellant in 84-1571

UNITED STATES OF AMERICA

vs.

LINSO, DENNIS

Dennis Linso, Appellant in 84-1577

UNITED STATES OF AMERICA

vs.

MORRELL, GEORGE

George Morrell, Appellant in 84-1578

Appendix A—Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit.

UNITED STATES OF AMERICA

vs.

PECIC, HENRY

Henry Pecic, Appellant in 84-1579

UNITED STATES OF AMERICA

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by

THEODORE MURPHY, APPELLANT IN 84-1594

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III
Judge

Dated: January 9, 1986

APPENDIX B

Order Amending Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1566, 84-1571, 84-1577, 84-1578
84-1579, 84-1594, 84-1599

UNITED STATES OF AMERICA

vs.

DE PERI, JOSEPH

Joseph DePeri, Appellant in 84-1566

UNITED STATES OF AMERICA

vs.

MARTIN, JAMES

James Martin, Appellant in 84-1571

UNITED STATES OF AMERICA

vs.

LINSO, DENNIS

Dennis Linso, Appellant in 84-1577

UNITED STATES OF AMERICA

vs.

MORRELL, GEORGE

George Morrell, Appellant in 84-1578

UNITED STATES OF AMERICA

vs.

PECIC, HENRY

Henry Pecic, Appellant in 84-1579

UNITED STATES OF AMERICA

Appendix B—Order Amending Opinion of the United States Court of Appeals for the Third Circuit.

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

On Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Criminal Nos. 84-00106-02, 84-00106-01A, 84-00106-03, 84-00106-04, 84-00106-05, 84-00106-06, 84-00106-07

Argued October 15, 1985

Before: ADAMS, HUNTER, *Circuit Judges*, and STERN,* *District Judge*

Opinion filed December 6, 1985

---

*Honorable Herbert Stern, United States District Judge for the District of New Jersey sitting by designation.

Appendix B—Order Amending Opinion of the United States Court of Appeals for the Third Circuit.

ORDER AMENDING OPINION

It is ORDERED that the printed slip opinion filed December 6, 1985 be amended to read as follows:

Page 12, line 1, first full sentence is amended to read as follows:

> "In a case involving extensive and allegedly inflammatory pre-trial publicity, we will find that the trial court abused its discretion only when appellants demonstrate clearly that the jurors possessed "such fixed opinions that they could not judge impartially the guilt of the defendant."

Page 33, Line 2: delete the word "above" and insert the word "alone"

Page 33, Line 9: 456-57 (3d Cir. 1979); should read: 456-57 (3d Cir. 1979).

By THE COURT

/s/ James Hunter, III

JAMES HUNTER, III,
Circuit Judge

DATE: December 13, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C

Opinion of the Court of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1566, 84-1571, 84-1577, 84-1578, 84-1579, 84-1594, 84-1599

UNITED STATES OF AMERICA

vs.

DE PERI, JOSEPH

Joseph DePeri, Appellant in 84-1566

UNITED STATES OF AMERICA

vs.

MARTIN, JAMES

James Martin, Appellant in 84-1571

UNITED STATES OF AMERICA

vs.

LINSO, DENNIS

Dennis Linso, Appellant in 84-1577

UNITED STATES OF AMERICA

vs.

MORRELL, GEORGE

George Morrell, Appellant in 84-1578

UNITED STATES OF AMERICA

vs.

PECIC, HENRY

Henry Pecic, Appellant in 84-1579

Appendix C—Opinion of the Court of the United States Court of Appeals for the Third Circuit.

UNITED STATES OF AMERICA

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
D.C. Criminal Nos. 84-00106-02, 84-00106-01A,
84-00106-03, 84-00106-04, 84-00106-05,
84-00106-06, 84-00106-07

Argued October 15, 1985

Before: ADAMS, HUNTER, *Circuit Judges*, and
STERN,* *District Judge*

Opinion filed December 6, 1985

---

*Honorable Herbert Stern, United States District Judge for the District of New Jersey, sitting by designation.

Appendix C—Opinion of the Court of the United States Court of Appeals for the Third Circuit.

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Appendix C—Opinion of the Court of the United States Court of Appeals for the Third Circuit.

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This case arises from a tragic chapter in the history of the Philadelphia Police Department dealing with conspiracy to extort protection money from video poker machine gambling operations and "numbers writers." In the spring of 1984, the grand jury investigating these activities issued an eighty-six count indictment against fifteen police officers,

including a Deputy Commissioner and a Chief Inspector. For management purposes, the District Court for the Eastern District of Pennsylvania ordered the severance of the defendants into two groups. Trial in this case dealing with the first group commenced on July 9, 1984.[1] On August 10, 1984, the jury returned a guilty verdict against the defendants on all submitted counts.[2] The trial court sentenced the defendants to prison terms of varying length. Deputy Commissioner Martin received eighteen years; Chief Inspector DePeri, fifteen years; Pecic, twelve years; Murphy, ten years; eight each for Linso and Katz; and Morrell received three. Defendants appeal their convictions and sentences for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (1982), the Hobbs Act, 18 U.S.C. § 1951 (1982), and obstruction of justice, 18 U.S.C. §§ 1503, 1510 (1982). For the reasons discussed below, we affirm.

I.

A. The Indictment and Trial

2. On May 3, 1984, a federal grand jury returned a multiple count indictment against fifteen officers and former officers of the Philadelphia Police Department charging participation in a conspiracy to extort and extortion of protection money from video poker machine and illegal numbers lotteries operators.

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1. The trial of the second group of defendants commenced on November 5, 1984. Three of these defendants were acquitted by the jury; one pled guilty of conspiracy and participation in a RICO enterprise and to a Hobbs Act violation; and the jury returned a guilty verdict against the remaining three. Sentencing is still pending against the remaining defendant who entered a guilty plea.

2. At the close of the government's case, the court dismissed two counts charging Hobbs Act violations.

Count One of the indictment charged each defendant with conspiracy, racketeering, and extortion. Count Two charged each defendant with a substantive RICO violation. Counts Three, Four, and Five charged Police Department Deputy Commissioner James Martin with obstructing a criminal investigation by paying hush money to Northwest Division Vice Unit Officer Albert Ricci. Counts Six and Seven charged Martin and Joseph DePeri, a Police Department Chief Inspector, with obstructing justice by ordering the destruction of records concerning the extorted payments. Counts Eight through Eighty-six charged the defendants with Hobbs Act extortion.

3. At trial, the evidence centered on the defendants' activities in the Northwest Division from late 1979 to April 1984. The government's case included the testimony of Albert Ricci, former Northwest Division Vice Lieutenant Joseph Alvaro, and the victims of the extortion scheme. Alvaro, who reported directly to DePeri while the latter served as the Northwest Divison's Inspector, was the government's key witness. Alvaro's testimony detailed how the extortion money was passed up the ranks from the bagmen to the Northwest Division's Inspector. In addition to Ricci's and Alvaro's testimony, the government introduced tape recordings of face-to-face and telephone conversations, primarily between Alvaro and Martin, DePeri, and Ricci.

B. The Appellants

4. The Philadelphia Police Department is organized into geographic divisions, with each division composed of approximately two districts. Each division also contains a vice unit charged with investigating violations of the city's and Pennsylvania's vice laws, including illicit gambling. Until 1980, Harry Pecic was the vice lieutenant in the Northwest Division. In late

1979, the evidence shows that Pecic began to extort protection payments from numbers writers and video poker machine operators. After he was transferred to another division, Pecic met with Alvaro at Inspector DePeri's request and provided Alvaro with the list of protected numbers and poker machine establishments located in the Northwest Division. DePeri also told Alvaro to use the code name "Whitey" to identify himself to the operators when he collected the money.

5. Joseph DePeri was appointed Inspector of the Northwest Division in December, 1980. DePeri selected Joseph Alvaro as his vice lieutenant to replace Pecic after DePeri's first choice for vice lieutenant, defendant George Katz, was rejected by the Police Commissioner. Alvaro testified that DePeri discussed collecting the protection money with him, and instructed Alvaro to build up the collection list and to pick one of the members of his vice squad as the bagman.

6. Alvaro chose Albert Ricci to be the bagman. With the list of protected locations provided by Pecic, Ricci collected payments from old clients and expanded the scheme by adding new ones, primarily video machine vendors, to the list. The evidence shows that Ricci increased business by seizing unprotected poker machines and transporting them to Northwest Division Headquarters. Ricci would then hook the vendors into the scheme by offering to sell the machines back to them with the understanding they could continue to use the machines for gambling if Ricci received a monthly stipend of fifty to one hundred dollars per machine. Ricci would collect the payments twice a month and would pass the payments to Alvaro, who in turn passed approximately two-thirds of the money to DePeri. Alvaro managed the extortion scheme, comparing notes with Ricci to ensure that all the victims had paid up before Alvaro delivered the money to DePeri. Eventually, the protection scheme

expanded to the point where Ricci's share of the collection increased from three hundred to fifteen hundred dollars per month, out of a gross of six thousand dollars per month.

7. George Katz, DePeri's first choice for Alvaro's slot, remained a lieutenant in the North Division. Alvaro testified that DePeri instructed him to allow Katz to collect some protection payments in the Northwest Division "to give George Katz an opportunity to make a few dollars for himself."

8. The Northwest Division contains two districts, the Fifth and the Thirty-ninth. Captain Dennis Linso commanded the Northwest Division's Fifth Division where Officer George Morrell worked as a patrolman. Alvaro and Ricci testified that Linso also extorted protection payments, employing Morrell as his bagman.

9. Lieutenant Theodore Murphy commanded the Southwest Division's vice unit. Alvaro testified that Murphy had called him to inquire as to whether Alvaro received protection money from a certain vendor. Donald Devore, a video game vendor, testified that he paid protection money directly to Murphy. William Dawley, also a video game vendor with machines in the Southwest Division, testified that he paid protection money to Central Division Inspector John DeBenedetto, an unindicted coconspirator. This money was later transferred to the Southwest Division. Dawley also testified that he had met with Murphy on one occasion to verify the locations of Dawley's video poker machines.

10. James Martin entered the conspiracy when he served as Night Command Inspector, working in the office across the hall from Inspector DePeri. Martin began collecting protection money from Lester Barry, a numbers writer, in early 1982. When DePeri was appointed Chief Inspector in June, 1982, Martin was

promoted to Northwest Division Inspector. Despite this change in personnel, the extortion scheme proceeded uninterrupted: Ricci continued to pass the money to Alvaro, who then gave it to Martin. After Alvaro was promoted to Captain in the Police Radio Division in July, 1982, Ricci testified that he delivered the payments directly to Martin. Martin remained at the Northwest Division until November, 1983, when he was appointed Deputy Commissioner.

C. The Investigation and Attempted Cover-up

11. In November, 1982, a federal grand jury served subpoenas for the contents of certain Central Division officers' desks, including Inspector DeBenedetto's.[3] Learning of this, Chief Inspector DePeri called Captain Alvaro at Police Radio, and instructed him to destroy the two copies of the poker machine payoff list kept at Northwest Division Headquarters. Alvaro returned to the headquarters, broke into Martin's desk, and retrieved Martin's poker machine payoff list. Alvaro also searched Ricci's desk and found Ricci's copy of the payoff list along with some of the extorted funds. After returning the money to Ricci, Alvaro went home and burned both payoff lists.

12. Once Alvaro began cooperating with the federal investigation, he recorded conversations with DePeri and Martin concerning the destruction of the lists. During a conversation with Martin, Alvaro expressed his concern that the grand jury would infer that he had retrieved and destroyed the payoff papers in Martin's desk. In response, Martin indicated his willingness to testify before the grand jury that he had ordered Alvaro to break into his desk to retrieve his

3. As a result of this earlier investigation, DeBenedetto was tried and sentenced to eight years in prison for extortion on August 1, 1983.

own papers. In another conversation, after observing that Ricci had been indicted by the grand jury, Martin told Alvaro that he would be able to raise the money to cover Ricci's back taxes and legal expenses to repay Ricci for "going to bat" for him.

13. According to the government, the investigation produced evidence of a city-wide conspiracy, unbounded by any particular police division. Although the defendants in this consolidated appeal were all connected to the scheme through the Northwest Division, the government took the position at trial that the evidence established that protection money was passed vertically within the Northwest Division and laterally between divisions.

II.

14. Appellants raise a plethora of issues in this appeal, most of which deal with the discretionary authority of the trial court in ruling on evidentiary matters. Many of these issues affect all of the defendants, but most affect only a few and some are raised by only one of the seven. Most of the issues involve the straight-forward application of settled legal principles. Consequently, we will abbreviate much of our discussion. We believe that the most serious issue in this appeal concerns the the introduction of coconspirators' statements against some of the appellants, particularly those statements contained in the taped conversations between Alvaro and Martin and Alvaro and DePeri. Although there is a great deal of overlap in many of the issues raised, we will discuss the questions raised by each appellant in the order in which they are listed in this appeal.

Appendix C—Opinion of the Court of the United States Court of Appeals for the Third Circuit.

A. Claims Initially Raised by DePeri

Pre-trial Publicity and the Denial of the Jury Sequestration Motion

15. DePeri, Pecic, and Murphy argue that the extensive pre-trial publicity surrounding the scandal biased the jury and deprived them of a fair trial. In particular, appellants complain that a series of articles that appeared in *The Philadelphia Inquirer*'s Sunday magazine supplement entitled "Cops on the Take," describing a related extortion scheme irrevocably tainted the trial. Appellants claim that because jury selection convened on July 9, 1984, one day after the second installment in the *Inquirer* series appeared, and because the majority of the prospective jurors questioned by the court admitted some knowledge of related extortion schemes, appellants were deprived of their right to a fair trial.

16. The district court's *voir dire* spanned four days, during which the court individually examined eighty-one jurors on the extent of their exposure to the case and the degree to which they had formed an opinion concerning the officers' conduct. Although seven of the jurors who deliberated and returned the guilty verdicts admitted that they had been exposed to the publicity surrounding the case, and two admitted to familiarity with the *Inquirer* series, we believe that the trial court's exhaustive *voir dire* ensured that appellants were not deprived of their sixth amendment right to a fair trial decided by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

17. *Voir dire* is conducted under the supervision of the trial court and is left to its sound discretion. *See*

Ristaino v. Ross, 424 U.S. 589, 594 (1976). In a case involving extensive and allegedly inflammatory pre-trial publicity, we will only find that the trial court abused its discretion when appellants demonstrate clearly that the jurors possessed "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 104 S.Ct. 2885, 2891 (1984), *citing Irvin*, 366 U.S. at 723. It is the rare case in which adverse pretrial publicity will create a presumption of prejudice that overrides the jurors' assurance that they can be impartial. *See United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir.), *cert. denied*, 449 U. S. 899 (1980). The mere fact that community members are cognizant of the crimes and of the defendants' identities does not, by itself, render the trial constitutionally unfair. *See Dobert v. Florida*, 432 U.S. 282, 303 (1977). Instead, we must examine the totality of the circumstances surrounding the trial for the conjunction of extensive and inflammatory publicity immediately prior to trial, evidence of the community's outrage at the revelation of the crimes, and clear indications of juror partiality on the record, before we can reverse the trial court's finding of jury impartiality for manifest error. *See Yount*, 104 S.Ct. at 2889-90; *Irvin*, 366 U.S. at 723, 728. *Cf. Murphy v. Florida*, 421 U.S. 794, 800 (1975).

18. Our review of the circumstances surrounding the trial leads us to conclude that the court did not abuse its discretion. Although the pre-trial publicity was extensive, and there was no "cooling off" period between the publicity and trial as in *Yount*, we find a lack of inflammatory, sensational journalism that would lead us to question the jury's impartiality. Moreover, the *Inquirer* articles only indirectly concerned appellants. Only one defendant, Martin, is mentioned, and then only in passing. The articles detail a structurally similar but apparently separate

extortion scheme conducted in the Central Division by Inspector DeBenedetto. Nor do we discern an overpowering sense of outrage in the community or evidence of juror partiality in the record. Appellants fail to bring to our attention any portion of the *voir dire* that indicates that *any* juror had made up his mind with regard to the merits of the government's case. Further, we note that ten jurors were seated without challenge by appellants. As to these ten, whether or not exposed to the pre-trial publicity, failure to challenge generally waives defendants' objections on appeal. *See Provenzano*, 620 F.2d at 996 n.15. Concerning the two jurors who were seated over defendants' challenges, our review of the record shows that the trial court's careful *voir dire* established that at most, the jurors were aware of the scandal, but could not recall more than the fact that "there were some policemen indicted for racketeering." The court properly determined that these jurors had not made up their minds as to the guilt or innocence of any of the defendants and that they would be impartial.

19. This is the second time we have had the opportunity to review the *voir dire* proceedings in this case, and we reaffirm our approval of the trial court's conduct. In *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984), we commended the trial court's "patient and careful examination of potential jurors . . . [as] an excellent example of the power of *voir dire* to screen out persons who may not be impartial." The record shows the district court's acute sensitivity to the problems generated by the public profile of this case. That the jurors were familiar with the broadest details of the scheme was inevitable from the publicity surrounding the trial; that the jurors ultimately impanelled provided defendants with a fair trial is due entirely to the skill of the trial judge in conducting a searching and effective *voir dire*.

20. Pecic argues that the district court abused its discretion in denying his motion to sequester the jury during the trial and during its deliberations. The decision whether to sequester the jury lies wholly within the discretion of the district court. As the district court observed when it denied defendants' post-trial motions, "sequestration is an extreme measure, 'one of the most burdensome tools of the many available to assure a fair trial.'" *quoting United States v. Porcaro*, 648 F.2d 753, 755 (1st Cir. 1981). In light of the trial court's instructions to refrain from reading, viewing television, or listening to the radio reports about the case, the court's daily examination of the jurors to determine if they were following this instruction, and the circumstances and the length of the trial, we find no abuse.

Exclusion of Evidence Concerning DePeri's Attitude Towards Children

21. Alvaro testified to attending a meeting between Inspector DePeri and poker machine vendor Joseph Lamarra in which DePeri told LaMarra "that if anybody ever squealed on him, he would kill his f-----g kids." In an attempt to rebut this testimony, DePeri tried to introduce testimony that he had suffered a severe trauma when a school bus killed his child more than ten years ago. According to DePeri, the effects of this trauma made it unlikely that DePeri would threaten the life of any child. This testimony would also show that "children were very dear to DePeri and that he took a special interest in the children of the people under his command" and that DePeri had organized charitable collections for children. DePeri argued that this evidence would undercut Alvaro's testimony by showing that it was inconsistent with DePeri's high regard for the welfare of children. The court declined to accept this argument, however, and excluded the

evidence under Federal Rules of Evidence 401 and 403 as irrelevant and prejudicial.

22. We believe that the district court did not abuse its discretion in excluding this evidence. DePeri's state of mind regarding children in general does not make his statement to LaMarra "more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Moreover, the evidence appears to be an effort to evoke the jury's sympathy toward DePeri by introducing an account of DePeri's misfortunes. We hold therefore that the court properly found DePeri's proffer of evidence irrelevant and prejudicial.

Introduction into Evidence of Officer Molloy's Testimony

23. Lawrence Molloy was a Philadelphia police officer formerly assigned to the Central Division. Molloy was indicted in 1983 and subsequently convicted on charges of accepting illegal protection payoffs. At appellants' trial, Molloy testified concerning the collection and distribution of protection payments from numbers writers and video poker machine vendors in the Central Division. In the course of his testimony, Molloy indicated that he presently resided at a halfway house in Camden, New Jersey, and had been convicted for extortion. Molloy also testified that he did not know any of the appellants.

24. DePeri and Martin argue that the court erred in admitting Molloy's testimony. They contend that Molloy's testimony was irrelevant because it did not concern the extortion scheme in the Northwest Division and that the court should have excluded the testimony as prejudicial under Federal Rule of Evidence 403 because of Molloy's conviction on charges similar to the charges brought against appellants. We will reverse the district court's decision to admit

Molloy's testimony only if appellants demonstrate that the ruling was "arbitrary or irrational." *United States v. Friedland*, 660 F.2d 919, 929 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). Our review of the record leads us to conclude that the court's decision was neither arbitrary nor irrational. Molloy's testimony was probative of the defendants' alleged use of the Philadelphia Police Department as a vehicle to collect and distribute the protection payments. Molloy testified that he received payoffs from vendors who had poker machines "all over the city," and, more importantly, collected payments for machines that were not located in the Central Division. This money was funneled directly to Inspector DeBenedetto of the Central Division. Alvaro later testifed that he contacted DeBenedetto to receive payoffs collected by DeBenedetto's men from vendors with machines located in the Northwest Division. This evidence revealed that the defendants' extortion activities were not limited to the Northwest Division, and that the defendants used the services of other divisions to help collect protection money, as the indictment charged.

Improper Prosecutorial Comments

25. DePeri, Pecic, and Murphy assert that the government prejudiced their trial by informing the jury that its witnesses had passed polygraph examinations. This statement allegedly occurred during the following exchange between the government and Captain Linso:

> Q. Is it your testimony that [certain poker machine vendors] did not pay you or any representative of you for any poker machines?
>
> A. That is exactly my testimony and they didn't take a lie detector test either like I wanted to do.

> The Government: Your Honor, I would ask that that be striken.
>
> Mr. Tinari: Objection.
>
> The Court: Sustained.
>
> The Government: It's also untrue.
>
> Mr. Tinari: That is objected to. I move for a mistrial.
>
> The Court: Denied. The jury will disregard Mr. Klein's comment and the jury will disregard this witness's answer to which I have sustained an objection and give no consideration to these matters in any way. Shall we continue?

According to appellants, the prosecutor's remark that Linso's statement was "also untrue" constituted impermissible vouching for the credibility of its witnesses, the poker machine vendors. While we agree that the government's statement was improper, we hold that even if the statement constituted error, the error is harmless and did not require the court to grant the mistrial motion. *See United States v. Hastings*, 461 U.S. 499, 509 (1983). Under *United States v. DiPasquale*, 740 F.2d 1282, 1296-97 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1226 (1985), we must examine the record as a whole to ascertain whether the error prejudiced defendant's trial, such that within the setting of the trial, the error was "so insignificant and unimportant" that it may be deemed harmless. *See Chapman v. California*, 386 U.S. 18, 22 (1967). The record shows that this comment is ambiguous. The government did not state that its witnesses had taken polygraph exams, it stated only that Linso's statement was "untrue," which could have also meant that Linso

did not take a lie detector test. The record also shows that the government's remark was isolated, that the prejudice, if any, to the defendants was minimal, especially in light of the court's prompt corrective instruction, and that the evidence against appellants was strong.

Variance Allegations

26. DePeri, Linso, Pecic, and Katz maintain that the indictment impermissibly varied from the proof at trial. Appellants contend that while the indictment charged a single conspiracy, the proof supported only a finding of "ad hoc associations of various officers." Essentially, they argue that the government failed to show their association to each other within the RICO enterprise charged, the Philadelphia Police Department, in sufficient detail to permit their conviction.

27. The burden on the government under RICO was to show that the defendants knowingly agreed to participate in the RICO conspiracy. *See United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.), *cert. denied*, 105 S. Ct. 243 (1984). In *Jannotti*, we observed that

> 'The mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs of the enterprise have been conducted "through" a pattern of racketeering activity' . . . . Instead, the government must show that a person 'is enabled to commit the predicate offenses solely by virtue of his position in the enterprise; or . . . the predicate offenses are related to the activities of that enterprise.'

Id. (citations deleted). The evidence at trial established that the defendants' positions in the Philadelphia

Police Department enabled them to collect and distribute protection profits, contact and involve new clients in the racket, and enforce the extortion scheme. The evidence presented to the jury would have allowed it to conclude that the defendants "knowingly agreed to participate in the 'enterprise' through a pattern of racketeering." *United States v. Riccobene*, 709 F.2d 214, 221 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983).

28. In reviewing the jury's finding that the defendants were involved in a single enterprise, we must determine if there is sufficient evidence, viewed in the light most favorable to the government, to support its finding. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1189 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 (1985); *United States v. Leon*, 739 F.2d 885, 890-91 (3d Cir. 1984); *United States v. Provenzano*, 620 F.2d 985, 999 (3d Cir.), *cert. denied*, 449 U.S. 889 (1980). A review of the record compels us to hold that the evidence sufficed to link these defendants to the conspiracy and establish RICO liability. In *United States v. Maker*, 751 F.2d 614, 625 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 3479 (1985), we observed that a single scheme is demonstrated when "the evidence shows a common goal, operations carried out in virtually identical manner, and an overlapping of defendants." All three factors are present in this case. The common goal was the extortion of poker machine vendors and numbers parlors; the method of extortion in all cases was similar--the machines would be seized and sold back to the operators for the same price, the protection money ranged between fifty and one hundred dollars per machine in all areas, the victims payed on the first or fifteenth of the month, there was a common code name ("Whitey") that was passed on to the bagmen, the money was collected and passed "up the ladder" to the Inspectors (Central Division

Inspector John DeBenedetto. Northwest Division Inspectors DePeri and Martin); and the defendants, although stationed in different divisions, came into contact with one another in the course of dividing the profits from and enforcing the protection scheme.

29. DePeri, Murphy, and Katz claim they could not have participated in a single conspiracy because they did not know the identities of all of the other participants nor were they aware of the overarching conspiracy. This knowledge is not essential to the finding of a RICO conspiracy. As we said in *Riccobene*, "[i]t is well established that one conspirator need not know the identities of all his coconspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." 709 F.2d at 225. The government proved that the defendants understood the essential nature of the plan and knowingly agreed to participate in the plan, which is sufficient for RICO liability. *See id.*

Open Court Statement by a News Reporter

30. DePeri, Pecic, and Murphy argue that the statement by a *Philadelphia Inquirer* reporter in the courtroom before the jury concerning the poor sound quality of tape recorded conversations played before the court prejudiced their trial by alerting the jury to the high profile of the case. While the court listened to Alvaro and Ricci discuss the latter's job prospects after his extortion indictment, the following exchange took place:

> The Court: Can the sound be turned up at this point for the audience?
>
> Mr. Weiner: My name is Tim Weiner, I work for the Philadelphia Inquirer.

> Mr. Lazin: Is this something that is appropriate to be heard in front of the jury? I have an idea what he is going to say.
>
> The Court: I think what he is going to say [sic], we will let the jury stay in the courtroom.
>
> Mr. Weiner: For the purposes of the record, one of the two speakers, the one on the right, is in open pain, and the sound and signals emanating from the one on the left is unintelligibile, utterly unintelligible, to the audience and members of the press and the public without the aid of the transcript. For the purposes of the record, we would respectfully ask after the playing of the tape is completed, that your Honor delay further playing of the tapes until counsel may be heard on this matter. We are here as the eyes and ears of the public on a matter of great public importance and we cannot function under these conditions. Thank you.

The court directed a technician to resolve on the problem and ruled that the press could read copies of the tape transcripts during lunch recesses. The court then excused the jury, and a number of other reporters registered complaints with the court, *e.g.*, that they were not able to make copies of the transcripts or the tapes. The defendants moved for mistrial again out of hearing of the jury, on the ground that the jury's verdict would be influenced by their knowledge of the trial's public interest. The court denied the motions. When the jury returned, the court gave a corrective instruction admonishing them to ignore to the reporter's remarks.

31. This third party communication with the jury would be considered objectionable and provide sufficient grounds to overturn the verdict if it can be shown that it violated the sixth amendment's guarantees, *e.g.*, if the statement somehow calls the jury's impartiality into question, or deprives the defendant of his rights of confrontation and counsel. *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 150-51 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

32. In this context, the reporter's statement neither biased the jury against the defendants nor did it provide the jury with novel information concerning the public's interest in the trial. Given the lack of prejudice and the court's prompt corrective instruction, we find no error.

Agent Gamber's Reports

33. DePeri argues that the court erred by refusing to allow him to introduce into evidence reports completed by Federal Bureau of Investigation Agent Gamber detailing his interviews with video poker machine vendors LaMarra and Cook. DePeri claims that these reports contained statements by LaMarra and Cook that would have impeached part of Alvaro's testimony and argues that the court should have admitted the interviews under the business records exception to the hearsay rule.

34. We disagree. The applicable rule here is Federal Rule of Evidence 803(8), the public records exception to the hearsay rule. Although this rule generally permits the introduction of public records into evidence by either party in a civil proceeding, subdivision (B) prevents the introduction of law enforcement reports against defendants in criminal cases. *See United States v. Grady*, 544 F.2d 598, 604

(2d Cir. 1976). Unlike subdivision (C) dealing with factual findings resulting from official, non-law enforcement investigations, subdivision (B) does not provide explicitly for the introduction of police reports into evidence against the government. In *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), the court reasoned that subdivision (B) "should be read in accordance with the obvious intent of Congress and in harmony with 803(8)(C) to authorize the admission of the reports of police officers and other law enforcement personnel at the request of the defendant in a criminal case." 521 F.2d at 968 n.24. Even under this reading of subdivision (B), the court correctly denied DePeri's request. This is a classic "hearsay within hearsay" problem. While Rule 803(8)(B) would permit DePeri's introduction of the reports themselves, which would ordinarily be considered hearsay, LaMarra's and Cook's out-of-court statements contained in the records require a separate hearsay exception before they can be admitted. Because DePeri did not provide the court with an applicable hearsay exception to allow the introduction of LaMarra's and Cook's statements, we hold that the court did not err in refusing to admit Agent Gamber's reports.

B. Claims Initially Raised by Martin

Admission of Tape Recorded Conversation between Ricci and Alvaro

35. At trial, Albert Ricci testified to handing an envelope containing ten thousand dollars in protection money directly to James Martin. On re-direct examination, to rebut defense counsel's implied charge that Ricci constructed this story as a bargaining chip when Ricci sought immunity from prosecution, the government played a tape recorded conversation between Ricci and Alvaro where Ricci states that he

passed the money to Martin. The court admitted the statement under Federal Rule of Evidence 801(d)(1)(b), which excludes from the definition of hearsay prior statements where "[t]he declarant testifies at the trial . . . and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication." When Alvaro made the tape, Ricci was unaware of the fact that this conversation was being recorded, and had not yet decided to inform the United States Attorney about his involvement in the protection scheme. On appeal, Martin suggests that because Ricci knew that he was a target of the grand jury investigation, Ricci had a motive to falsify his story to Alvaro, and consequently, the court erred in admitting Ricci's prior consistent statement.

36. The timing of consistent prior statements divides the courts of appeals. *Compare United States v. Quinto*, 582 F.2d 224, 234 (2d Cir. 1978) (reversing conviction when prior consistent statement made after the motive to falsify arose), *with United States v. Parodi*, 703 F.2d 768, 784-85 (4th Cir. 1983) (prior existence of motive to fabricate does not render the prior consistent statement inadmissible). We find it unnecessary to enter this debate here, as Martin fails to support his assertion with any evidence. The record, fairly read, indicates that Ricci addressed Alvaro as his former commanding officer, a coconspirator, and had no idea that the conversation would be of any value to him in the future. That Ricci's recorded statements are inculpatory, not exculpatory, evidences a lack of guile that supports the interpretation that the conversation occurred before Ricci decided to talk to the prosecutors. *See United States v. Roher*, 708 F.2d 429, 433 (9th Cir. 1983). In sum, we cannot discern a motive to falsify arising prior to the conversation, and

therefore find no error in the court's admission of the tape.

Alvaro's Interpretation of Martin's Recorded Statements

37. Martin argues that the trial court abused its discretion in allowing Alvaro to testify as to his understanding of tape recorded conversations between Alvaro and Martin. Under Federal Rule of Evidence 701, lay witnesses may state their understanding of the use of another person's statements "only if rationally based on the perception of a witness and helpful either to an understanding of the testimony of the witness on the stand or to the determination of a fact in issue." *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). Martin's language on the tapes is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to Martin and his audience. To the uninitiated listener, Martin speaks as if he were using code. Alvaro's opinions are based upon his direct perception of the event, are not speculative, and are helpful to the determination of Martin's involvement in the protection scheme and the subsequent attempt to silence Ricci with "hush money." Moreover, the trial court vigorously policed the government's examination of Alvaro to ensure that he was not asked to interpret relatively clear statements. Under these circumstances, we find that the court did not abuse its discretion.

Sufficiency of Evidence for Obstruction

38. Counts Three through Five of the indictment charged James Martin with obstruction of justice. These counts were based upon Martin's payment of

money to Ricci on three separate occasions: five hundred dollars on February 17 and March 26, and one thousand dollars on April 8, 1984. On appeal, Martin argues that the evidence presented at trial failed to establish beyond a reasonable doubt that Martin intended these payments to ensure Ricci's silence.

39. Martin contends that the evidence concerning his intent is ambiguous, and that the payments were merely loans advanced to his friend and neighbor, Albert Ricci. Our review of the evidence, viewed in the light favorable to the government, convinces us that the jury could have reasonably found that Martin's payments were intended to prevent Ricci from testifying about Martin's participation in the extortion conspiracy. The record is replete with offers by Martin to arrange to get Ricci a job, to support Ricci while he served time in prison, and to pay for Ricci's legal fees. Martin's admission that he owes Ricci financial support because Ricci is "going to bat for him" and that Ricci could expect this support only if Martin retained his freedom and Ricci kept his "mouth shut" supports the inference that these offers are not solely altruistic.

C. Claims Initially Raised by Linso

Sufficiency of the Evidence to Convict Linso of Participation and Conspiring to Participate in RICO Enterprise

40. Linso argues that while the testimony sufficed to show that he received protection payments, he lacked "knowledge about the essential nature of the conspiracy," and the government failed to show his "agreement to participate in the conduct and affairs of the enterprise" or his commission of "an overt act in furtherance of the conspiracy." Linso was the captain of the Fifth District under Inspector DePeri. Alvaro

testified that after DePeri originally chastised Linso for "fooling around with the machines," DePeri reconsidered his position and told Linso that "he could do what he wanted with the machines." Ricci testified that he delivered Linso's money directly to him at the Fifth District headquarters "maybe four or five times" and on two occasions had delivered money to Linso after Linso had been transferred from the Northwest Division. Ricci also testified that he and Linso had discussed the names of vendors who could "hurt him if they testified against him" before the grand jury. Donald DeVore, a video poker machine vendor, testified that he met with Linso at the Fifth District headquarters and discussed the number of machines he had in Linso's district, and the size and manner of protection payments for those machines. Viewed in the light most favorable to the government, we believe that the jury could have reasonably found that Linso understood the nature of the larger enterprise he was involved in, agreed to participate in that enterprise, and did indeed participate.

The Government's use of a Chart During its Opening Statement

41. Linso maintains that the use of a chart by the government in its opening statement deprived him of his right to a fair trial. He suggests that the chart linked him to the conspiracy before evidence concerning the conspiracy had been introduced. We disagree.

42. The opening statement is not evidence in itself, but serves "to give the jury the broad outlines of the case to enable the jury to comprehend it." *Government of the Virgin Islands v. Turner*, 409 F.2d 102, 103 (3d Cir. 1969). As long as the opening statement avoids references to matters that cannot be

proved or would be inadmissible, there can be no error, much less prejudicial error. *See Maxworthy v. Horn Electric Service, Inc.*, 452 F.2d 1141, 1143-44 (4th Cir. 1972). To begin, we take notice that such charts are often employed in complex conspiracy cases to provide the jury with an outline of what the government will attempt to prove. The chart complained of in the instant case contained the names of the participants in the protection scheme, including the defendants, the dates they served in the Philadelphia Police Department, and the divisions in which they served. After considering the arguments of the government and the defendants, the court permitted the use of the chart as a demonstrative aid to help the jury remember the names and positions of the defendants. We hold that the court did not abuse its discretion in allowing the government to use a visual aid in its opening statement. The use of a chart to preview the government's case certainly did not "poison the jury's mind" against the defendants, nor did it allude to "items of highly questionable evidence." *Turner*, 409 F.2d at 103.

Admission of Recorded Conversations Against Linso

43. Linso suggests that the trial court abused its discretion by admitting a recording of a telephone call in which Linso and Alvaro discussed the upcoming indictments. Linso argues that the tape should have been excluded on grounds of relevance and prejudice. We disagree. Linso displayed a cavalier attitude during the call, an attitude from which the jury could reasonably infer that Linso had failed to protest his guilt because he was culpable. Given Linso's counsel's insistence at trial that the jury hear the entire conversation, the sufficiency of the evidence apart from this tape to convict Linso, and the trial court's

instructions to the jury, after they had listened to the tapes, that references to indictments were not evidence, we find no abuse.

Admission of Goldsworthy's Statement Against Linso

44. Linso asserts that the trial court abused its discretion by admitting a statement by John Goldsworthy, a poker machine vendor, that he "understood" that the money he paid to Ricci would be going to "whoever was in that district." We disagree. Federal Rule of Evidence 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." We believe that Goldsworthy's statement was not hearsay because it was not offered to prove the truth of the statement, *i.e.*, that the protection money was actually going to all the Fifth District's officers. A more reasonable interpretation is that Goldsworthy testified as to his belief that he was paying protection money to the district rather than just to Ricci. Furthermore, we note that Linso's counsel neglected to pursue his objection and explore the basis for Goldsworthy's understanding on cross-examination. Under these circumstances, we find no abuse.

D. Claims Initially Raised by Morrell

Denial of Severance Motions by Morrell, Murphy, and Katz

45. Morrell contends that his resignation from the Philadelphia Police Department on March 29, 1983 terminated his association with the conspiracy as well. In accordance with department procedure, news of Morrell's resignation was sent over the department's teletype to all precincts. Captain Linso, Morrell's commanding officer and the only person in the conspiracy who knew about Morrell's involvement,

testified that he had read the teletyped report of Morrell's retirement. Given these facts, Morrell argues that he had shown that he had withdrawn from the conspiracy as a matter of law and was entitled to a severence from the trial of the other defendants.

46. The legal principles governing withdrawal are relatively clear. In *United States v. Continental Group, Inc.*, 603 F.2d 444, 467 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), we observed that "'[m]ere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal'." Once the government establishes by a preponderance of the evidence a defendant's connection with a conspiracy, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his coconspirators that he has abandoned the enterprise and its goals." *United States v. Steele*, 685 F.2d 793, 803 (3d Cir.) (citations omitted), *cert. denied*, 459 U.S. 908 (1982); *see United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978). If the defendant makes this prima facie showing, the government must rebut the showing "either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." *Steele*, 685 F.2d at 804. Relying upon *Steele*, Morrell believes that his retirement notice satisfied this burden and required the government to present further evidence of his continuing involvement in the conspiracy. We disagree.

47. *Steele* concerned General Electric's attempt to win a construction contract through a bribery scheme. Naples, a General Electric employee, argued that he had withdrawn from the conspiracy by resigning from General Electric. In holding that Naples

had made a prima facie case of withdraw, we noted that Naples had presented evidence that he had permanently severed his employment relationship with General Electric. Termination of employment with General Electric in *Steele* sufficed to notify Naples's coconspirators that he had abandoned the enterprise and, necessarily, its goals and any claim to the conspiracy's benefits. Resignation from the police department in the instant case did not carry the same message. Morrell failed to introduce any evidence to show that this notice affirmatively disassociated him from his contacts in the department or the victims of the extortion scheme, nor did the teletype message communicate that Morrell had repudiated all claim to the conspiracy's benefits. Unlike *Steele*, the government presented evidence showing that continued employment was not a necessary prerequisite to participation in the conspiracy. Under these circumstances, we hold that Linso's knowledge of Morrell's resignation, by itself, does not constitute the affirmative break with the conspiracy required to establish a prima facie case of withdrawal.

48. Murphy and Katz raise the same issue. Our review of the record leads us to conclude that there is even less support for the proposition that these defendants withdrew from the conspiracy. Murphy resigned on November 11, 1982 and Katz on March 14, 1983. Neither man produced evidence of an act that communicated abandonment of the enterprise and its goals to the other members of the conspiracy other than the resignation itself. With respect to Murphy, there is evidence that he attempted to extort money from a video machine vendor after he resigned from the department. We therefore hold that neither Murphy nor Katz established a prima facie case of withdrawal that might have supported a severence motion.

Appendix C—Opinion of the Court of the United States Court of Appeals for the Third Circuit.

Admission of Coconspirators' Statements Against Morrell, Murphy and Katz

49. Morrell, Murphy, and Katz maintain that the district court erred by permitting the admission of certain taped conversations recorded after they had allegedly withdrawn from the conspiracy. They argue that these tapes should not have been admitted against them because the court did not find specificially as to these appellants that the preponderence of the evidence established that they were coconspirators at the time of the recordings.

50. We have held previously that the government must establish by independent evidence the existence of an ongoing conspiracy and the connection of both the hearsay declarant and the defendant against whom the statement is offered to this conspiracy to trigger the coconspirator exception to the hearsay rule, Federal Rule of Evidence 801(d)(2)(E).[4] *See United States v. Inadi*, 748 F.2d 812, 816-17 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3838 (U.S. June 28, 1985); *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir. 1984) (in banc), *cert. denied*, 105 S. Ct. 779 (1985); *United States v. Ammar*, 714 F.2d 238, 245 (3d Cir.), *cert. denied*, 464 U.S. 963 (1983). Generally, the trial judgemakes a finding that the government has shown the conspiracy's existence by a preponderance of the evidence before the statement is admitted. *See United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). This practice ensures the reliability of the coconspirator's statements by linking the defendant to the conspiracy before the statements are admitted and prevents the

4. More accurately, coconspirators' statements are not "hearsay exceptions" but are excluded from the definition of hearsay as a type of party admission. *See United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 464 U.S. 963 (1983)

government from proving the conspiracy from the coconspirators' statements above. We recognize, however, that in complex trials involving a large amount of interrelated testimony, it may be necessary to admit the statements provisionally, subject to a later finding of a conspiracy established by the preponderance of independent evidence. *See United States v. Continental Group, Inc.*, 603 F.2d 444, 456-57 (3d Cir. 1979); *cert. denied*, 444 U.S. 1032 (1980).

51. In the instant case, the court exercised its discretion and admitted the recorded conversations subject to a later *Trowery* conspiracy finding. At the close of the government's case in chief, the trial court made a *Trowery* finding, prefacing its remarks by discussing the reasons why it could not rule that Morrell, Murphy, and Katz had made a prima facie case for withdrawal from the conspiracy. The court then went on to find that the evidence independent of the taped coconspirators' statements clearly established the existence of a conspiracy involving all of the defendants at the time of the conversations. Although we would have preferred a separate *Trowery* finding as to these appellants for the purposes of review, because the court made its *Trowery* finding immediately after dismissing appellants' withdrawal claims, we are compelled to hold that the court had reasonable grounds to find that Morrell, Murphy, and Katz were active participants in the conspiracy at the time of the conversations. *See Ammar*, 714 F.2d at 250.[5]

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5. We have repeatedly recognized that when the court denies a motion for acquittal on the conspiracy charge, the court's decision to send the case to the jury implies it has made a *Trowery* finding. *See Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 665 (3d Cir. 1980); *United States v. Continental Group*, 603 F.2d 444, 457 (3d Cir. 1979). The rationale for this rule is that both the denial of an acquittal motion and the admission of

Coconspirators Statements "Not in Furtherance" of the Conspiracy

52. Alternatively, Morrell, Murphy, and Katz allege that certain portions of the recordings should not have been admitted under the coconspirators exception because the statements were not made "in furtherance of the conspiracy." These conversations, most of them between Alvaro and Martin, concerned the grand jury investigation, the selection of counsel, and the need for character witnesses. We have observed that the "in furtherance" requirement of Rule 801(d)(2)(E) is generally given a broad interpretion. *See Gibbs*, 739 F.2d at 845. In *Ammar* we said that statements that "provide reassurance, serve to maintain trust and cohesiveness among [the coconspirators], or inform each other of the current status of the conspiracy further the ends of the conspiracy." *Ammar*, 714 F.2d at 252. Although the tapes do not concern the central focus of the conspiracy, *i.e.*, the extortion of protection payments, they contain conversations between members of the conspiracy apprising one another of their efforts to avoid indictment and conviction. As such, we hold that these statements were made in furtherance of the conspiracy.

Sixth Amendment Confrontation Right

53. Morrell and Murphy contend that the admission of certain portions of tape recorded

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coconspirators' statements require the court to find that the government has shown the conspiracy and the defendants' connection to it by a preponderance of the evidence. *See Steele*, 685 F.2d at 804; *Trowery*, 542 F.2d at 627. Because the court denied these appellants' withdrawal motions, it would not have been necessary for the court to find explicitly that appellants had participated in the conspiracy after their resignation for the purposes of admitting the challenged coconspirators' statements against them.

conversations, again mainly between Alvaro and Martin, violated their sixth amendment right to confront witnesses against them. The cases they cite supporting this proposition, however, are inapposite. In *United States v. Smith*, 578 F.2d 1227 (5th Cir. 1978), the court excluded the recorded conversation of a person who was not a member of the conspiracy at the time he made the statements. *Id.* at 1233. Appellants concede that Martin was a member of the conspiracy at the time of the conversations. *Bruton v. United States*, 391 U.S. 123 (1968), addressed a situation where a nontestifying co-defendant's confession was introduced into evidence against him at a joint trial, accompanied by the court's cautionary instruction to the jury that they could consider the confession only against the confessing defendant. Despite these instructions, the Supreme Court held that the statement was inadmissible because the confession clearly implicated the nonconfessing co-defendant in the crime. We should first note that the confession in *Bruton* constituted hearsay evidence against the co-defendant. As we discussed above, the trial court properly admitted these tapes against Morrell and Murphy under the coconspirators' statements exception to the hearsay rule.

54. Although the Supreme Court has indicated that the coconspirators exception is narrower than the sixth amendment requires, *see Dutton v. Evans*, 400 U.S. 74, 82 (1970) (plurality opinion), neither the Supreme Court nor this one has ever equated the two. *See Gibbs*, 739 F.2d at 852 (Rosenn, J., dissenting); *Ammar*, 714 F.2d at 255. Our examination of the record shows that appellants did not suffer any prejudice from the introduction of the statements. Indeed, we do not believe that the statements are covered by *Bruton* at all. Appellants are mentioned only briefly in the conversations when Alvaro and Martin discussed who they thought would be indicted.

Nothing in the conversation supports an inference that either Alvaro or Martin knew that Murphy or Morrell were involved in the extortion scheme. *Cf. United States v. Ruff*, 717 F.2d 855, 856 (3d Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984) (admission involving repeated references to defendant and detailing his substantial involvement in the crime charged held *Bruton* statements). Further, the trial court immediately instructed the jury that the indictment could not be construed as evidence of guilt. Under these circumstances, we hold that the introduction of the tapes did not violate appellants' sixth amendment confrontation right.[6]

Trial Court's Refusal to Give Morrell's Instruction

55. Morrell argues that the court erred by refusing to instruct the jury that it could not find Morrell guilty if they found that he acted as "a 'courier' or 'go-fer' for another defendant." In refusing to give the instruction, the court observed that it was confusing and that it incorrectly stated the law. We

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6. The Second Circuit interprets *Bruton* to hold that cautionary instructions are ineffective against hearsay statements when two conditions exist: (i) the statement by the nontestifying co-defendant is clearly inculpatory as to the defendant against whom it is offered and (ii) the statement is vitally important to the government's case. *See United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *see also Dutton v. Evans*, 400 U.S. 74, 87 (1970) (admitting coconspirator's inculpatory statement and distinguishing *Bruton* because the statement held not to be "crucial" or "devastating."). Under this analysis, the court did not err in admitting the tapes against Morrell or Murphy. The cited portions of the tape do not clearly implicate either Morrell or Murphy in the conspiracy, nor are they even arguably central to the government's case against them.

agree. Section 1962(c) makes liable those persons who are "employed by or associated with" the RICO enterprise. This section draws no distinction between the foot soldier and the general: "the legislative intent was to make RICO violations dependent upon behavior, not status." *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977). "Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved in the enterprise." *United States v. Elliot*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). It is no abuse of discretion to refuse to give a misleading instruction. *See United States v. George*, 625 F.2d 1081, 1087 (3d Cir. 1980).

E. Claims Initially Raised by Pecic

Denial of Pecic's Severance Motion

56. Pecic contends that because the taped conversations did not involve or mention him, and because he was tried with other, more "notorious" defendants, the court abused its discretion in refusing to grant his severance motion.

57. Federal Rule of Criminal Procedure 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election of separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

Rule 14 places the burden of showing prejudice from the joinder on the defendant. *United States v. Lipowitz*, 407 F.2d 597, 601 n.15, *cert. denied*, 395 U.S. 946 (1969). We will reverse the district court's decision to deny a Rule 14 severance motion only on a

showing of abuse of discretion. *United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978); *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). Pecic thus faces the "heavy burden" of showing the trial judge exceeded the bounds of his discretionary authority. *Boyd*, 595 F.2d at 125.

58. We cannot say that Pecic meets this burden. "A defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than against him." *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Our review of the record and our discussion below of Katz's "spillover" claim lead us to conclude that the evidence was cogently presented and that the jury was able to "compartmentalize" the evidence against Pecic. *See Dansker*, 537 F.2d at 62.

Refusal to Produce Requested Evidence

59. Pecic asserts that the government's non-production of information in its possession concerning poker machine vendors who did not admit to being extorted violates *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* requires that the government provide a defendant with exculpatory, material evidence in its possession prior to the commencement of trial. *See generally United States v. Higgs*, 713 F.2d 39, 41-42 (3d Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984). The requested information is neither exculpatory nor material to Pecic's defense, however. Even if we conceded that this evidence were somehow exculpatory, it is not material, as we do not believe that "the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104, (1976). Evidence that not all vendors were extorted is irrelevant to the charge that defendants conspired to extort and did extort protection payments from certain vendors. *Cf. United States v. Harrison*,

679 F.2d 942, 948-49 (D.C. Cir. 1982) (evidence that certain witnesses had not purchased drugs from defendant did not undercut government's case).

F. Claim Initially Raised by Katz

Spillover of Evidence Introduced Against Co-defendants

60. Katz argues that *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982), require this court to vacate his sentence. Katz asserts that the alleged variance between the multiple conspiracies charged in the indictment and the single conspiracy proved at trial allowed the government to introduce evidence unrelated to the conspiracy proved. This may be a "classic" spillover theory, *see United States v. Schurr*, ___ F.2d ___, ___, slip op. at 15 (3d Cir. Oct. 30, 1985), but because we find no variance between the RICO conspiracy charged and the one proved at trial, it is irrelevant. The existence of a variance is a prerequisite to our determination that the allegedly improper evidence materially prejudiced Katz's trial. *See Schurr*, ___ F.2d at ___, slip op. at 15; *Camiel*, 689 F.2d at 35.

61. Katz's spillover argument is better understood as alleging prejudicial joinder of defendants, *i.e.*, that the jury was unable to separate the evidence relevant to Katz from the evidence introduced against the other defendants and thus did not render a fair verdict as to Katz. In particular, Katz maintains that the quantity and manner of presentation of the taped conversations admitted against the other defendants might have confused the jury to the extent that the jury transferred guilt from his co-defendants to Katz. Thus, we will analyze Katz's spillover claim as an appeal of the denial of his pre-trial severance motion.

62. As we noted in our discussion of Pecic's severance motion, a defendant is not entitled to severance merely because the government's evidence against his co-defendant is stronger than its evidence against him. Although we are sensitive to the dangers presented by joinder, *see, e.g., State ex rel. Whitman v. Fox*, 160 W. Va. 633, ___, 236 S.E.2d 565, 527-73 (1977), we also believe that good reasons support the general rule that persons charged with conspiracy should be tried together. *See United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977). Chief among these is the conservation of public resources that would be lost if the same evidence were presented at separate trials and the decreased possibility of prejudice where the evidence against each defendant is strong. *See United States v. Lane*, 584 F.2d 60, 65 (5th Cir. 1978).

63. Federal Rule of Criminal Procedure 14 requires the trial court to balance the public interest considerations in a joint trial against the possibility of prejudice inherent in the joinder of defendants. Our scope of review of the court's denial of a motion for severance is limited: "the district court's denial of such a motion will not be disturbed absent an affirmative showing that the court's ruling resulted in such prejudice to the moving party that it amounted to an abuse of discretion." *Dansker*, 537 F.2d at 61, *citing United States v. De Larosa*, 450 F.2d 1057 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972). The proper question on appeal is whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence. *See Dansker*, 537 F.2d at 62; *United States v. Serubo*, 460 F. Supp. 689, 694 (E.D. Pa. 1978), *vacated on other grounds*, 604 F.2d 807 (3d Cir. 1979).

64. We do not believe that Katz has met his burden. Our review of the record shows that the evidence was presented in a clear fashion and that the court carefully instructed the jury as to the manner in which the evidence could be considered. Moreover, the record reveals that all counsel, including Katz's, were alert to the possibility of prejudice from the introduction of the tapes, and ensured that the court gave limiting instructions where necessary. Consequently, we believe that Katz's allegation of prejudice through the transference of guilt between defendants here is speculative and as such, meritless. *See Opper v. United States*, 348 U.S. 84, 95 (1954).

III.

65. After careful consideration of defendants' arguments and a thorough examination of the record, we are of the opinion that there is no merit to any of the issues raised on this appeal. Accordingly, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania

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Criminal Action No. 84-106 (1 thru 7)

UNITED STATES OF AMERICA,

v.

JAMES MARTIN, *et al.*

OPINION AND ORDER

HUYETT, *J.* September 12, 1984

On August 10, 1984, following a 24 day trial, James Martin, Joseph DePeri, Dennis Linso, George Morrell, Henry Pecic, Theodore Murphy and George Katz[1] were each found guilty of conspiring to violate the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. 1962(d); and a substantive RICO violation under 18 U.S.C. §1962(c). James Martin was also found guilty of three counts of obstruction of a criminal investigation, in violation of 18 U.S.C. §1510; one count of being an accessory after the fact to obstruction of justice, in violation of 18 U.S.C. §3; and 12 counts of extortion

[1] Fifteen defendants were named in the eighty-six count superseding indictment returned on May 3, 1984. The seven defendants named above were tried and found guilty on all charges on August 10, 1984. The trial of the eight remaining defendants is scheduled to begin on November 5, 1984.

under color of official right, in violation of the Hobbs Act, 18 U.S.C. §1951. Joseph DePeri was also found guilty of obstruction of justice in violation of 18 U.S.C. §1510; and 10 counts of extortion under color of official right. Dennis Linso was also found guilty of 7 counts of extortion under color of official right; George Morrell, 6 counts; Henry Pecic, 2 counts; Theodore Murphy, 8 counts; and George Katz, 2 counts, all in violation of the Hobbs Act, 18 U.S.C. §1951.[2]

Presently before me are the motions of Joseph DePeri, Dennis Linso, George Morrell, Henry Pecic, Theodore Murphy, and George Katz for arrest and judgment, judgment of acquittal or, alternatively, for a new trial.[3] For the reasons that follow, the motions are denied.

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[2] Count One of the superseding indictment charges all defendants with participating in a conspiracy to participate, directly and indirectly, in the conduct of the affairs of the Philadelphia Police Department through a pattern of racketeering activity, consisting of multiple acts of extortion under color of official right and bribery. Count Two charges all defendants with a substantive RICO violation. Counts Three, Four and Five each charge defendant Martin with obstructing the federal investigation of alleged RICO and Hobbs Act violations by making cash payments to Albert Ricci. Count Six charges defendant DePeri with obstruction of justice. Count Seven charges defendant Martin with being an accessory after the fact to obstruction of justice. Counts Eight through Eighty-six charge defendants with Hobbs Act extortion. Counts 27 and 49, each charging a Hobbs Act violation, were dismissed at the close of the government's case.

[3] Defendant Martin filed no post-trial motions. Defendant DePeri filed no individual motions, but joined instead in the motions of other defendants. Only defendant Morrell submitted a memorandum of law in support of his motions.

Appendix D—Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

1. Pretrial Rulings

Defendants assert as error several of my pretrial rulings, including my denial of motions for severance and motions to dismiss the indictment on the grounds that the government improperly designated the Philadelphia Police Department as the RICO enterprise. In denying the present motions, I incorporate the reasons stated in my pretrial orders, especially those dated June 19, 1984 and June 17, 1984, as well as the bench opinion I issued on July 9, 1984.

2. Pretrial and Trial Publicity

Defendants Pecic and Murphy assert that publicity both before and during the trial in this case deprived them of their right to a fair trial. Specifically, defendants contend that the jury was biased and influenced by the pretrial publicity surrounding this case. Defendant Pecic additionally argues that I erred in failing to sequester the jury during trial and during its deliberations.

As I have stated on other occasions, it is clear that this case was the subject of rather extensive media coverage, both before and during trial. Such extensive publicity does not, however, give rise to a presumption of jury prejudice. *United States v. Hall*, 424 F. Supp. 508, 516-17 (W.D. Ok. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976).

Because of the pretrial publicity surrounding this case, I conducted individual *voir dire* proceedings. Over a four day period I questioned each prospective juror individually regarding media coverage and other sensitive matters. My questions included those

submitted by defendants, and were aimed at determining the individual's exposure to pretrial publicity, the effect of such exposure, and the individual's ability to be fair and impartial. Many individuals were excused due to my concern about their ability to be impartial.

The Supreme Court has suggested that when the potential for prejudicial publicity is present, the trial court should rely primarily on the curative device of *voir dire* examination, the traditional method of protecting defendants from the adverse effects of publicity. *See Chandler v. Florida*, 449 U.S. 560 (1981). I believe that the use of *voir dire* in this case adequately safeguarded defendants' rights to a fair trial and resulted in a fair and impartial jury.

Defendant Pecic also argues that I erred by denying defendant DePeri's motions to sequester the jury during trial and during its deliberations. A motion to sequester the jury during trial is addressed to the discretion of the court. *United States v. Porcaro*, 648 F.2d 753, 755 (2d Cir. 1981). "Sequestration is an extreme measure, 'one of the most burdensome tools of the many available to assure a fair trial.' " *Id.* (citation omitted). Likewise, it is within the trial court's discretion to permit the jury to interrupt its deliberations to go home at night. *United States v. Carter*, 602 F.2d 799 (8th Cir.), *cert. denied*, 444 U.S. 967 (1979).

On a number of occasions, before *voir dire*, before trial, during trial, and during its deliberations, I instructed the jury that it was absolutely vital that they refrain from reading about this case, and from viewing or listening to

television or radio reports on it. I emphasized that the jury's total compliance with my instruction was necessary to the fair trial rights of defendants. I questioned the jury daily concerning their compliance with my instruction, and each day the members of the jury confirmed that they had followed my instructions.

There is no evidence, nor does defendant suggest, that the jury did not follow my instructions or that it was improperly influenced in any way during trial or during its deliberations. This was a lengthy trial and I believed that the jury would be happier and more attentive if permitted to return to their families each evening. My instructions and daily questioning of the jury provided sufficient protection to defendants' rights to a fair and impartial jury.

3. **Sufficiency of the evidence**

Each defendant contends that the evidence is legally insufficient to support the verdict against him.

A jury's verdict must be sustained if, when viewed in the light most favorable to the government, there is "substantial evidence" to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). When viewed in the light most favorable to the government, it is clear that the jury's verdict must be sustained.

I will describe the role and some of the evidence produced as to each defendant individually.

Appendix D—Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

A. *James Martin*[4]

Defendant James Martin was an Inspector assigned to Night Command in about 1980. He replaced defendant DePeri as Inspector of the Northwest Division in July 1982. Defendant Martin was subsequently promoted to the rank of Chief Inspector and, in January 1984, became the Deputy Commissioner of the Philadelphia Police Department. As Deputy Commissioner, defendant Martin had primary responsibility for the Major Investigations Division.

While he was assigned to Night Command, defendant Martin accepted payments on behalf of defendant DePeri from Lester Barry, a numbers banker, for protection in the Northwest Division. Defendant Martin passed these payments to Inspector DePeri, whose Northwest Division officers were located in the same building as Night Common offices.

When he replaced defendant DePeri as Inspector of the Northwest Division, defendant Martin received protection money for numbers operations and video poker machines for the month of July 1982 from Joseph Alvaro. When Joseph Alvaro was transferred from Northwest in July 1982, defendant Martin began receiving protection payments from Albert Ricci, who was the "bag man" for Northwest. Albert Ricci provided defendant Martin with protection payments of up to ten thousand dollars per month until Ricci was transferred from Northwest in March 1983. Defendant Martin also

[4] Defendant Martin does not challenge the sufficiency of the evidence as to him, but a discussion of his role is helpful to an understanding of the case.

continued to accept payments from Lester Barry for protection of his illegal gambling operations in the Northwest Division.

When the federal investigation of police corruption was made public, defendant Martin became worried that Albert Ricci would provide information to federal investigators regarding Martin's role in the conspiracy. In order to ensure Albert Ricci's silence, defendant Martin began to make hush payments to him. Defendant Martin paid Ricci $500 on February 17, 1984, $500 on March 26, 1984, and $1000 on April 8, 1984.

As Deputy Commissioner, defendant Martin utilized the newly-created Major Investigations Division ("MID") in order to generate the funds to pay for Albert Ricci's silence. He also utilized his position to obtain information regarding the federal investigation. As head of MID, defendant Martin attempted to stop the federal investigation by causing the city-wide seizure of video poker machines.

In March 1984, when Joseph Alvaro told defendant Martin that he was concerned that federal investigators would learn that Alvaro had gone to Northwest Division headquarters and taken poker machine records from defendant Martin's desk, Martin assured Alvaro that if he were questioned regarding the event, he would testify that he asked Alvaro to go to his desk to get some papers. Defendant Martin also informed Joseph Alvaro that he would continue to pay Albert Ricci, who also observed the event, to ensure his silence.

Appendix D—Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

B. ***Joseph DePeri***

Defendant Joseph DePeri was Inspector of the Northwest Division from December 1980 until June 1982. When he was assigned to Northwest, defendant DePeri asked Joseph Alvaro to come to Northwest as his vice lieutenant. Defendant DePeri told Alvaro that he wanted him to act as bag man for the collection of protection payments. Joseph Alvaro agreed to work at Northwest, but asked if he could bring Albert Ricci to the Northwest vice squad to act as its bag man. Defendant DePeri agreed.

Albert Ricci collected money from numbers operators and video poker machine vendors in the Northwest Division. He passed the money to Joseph Alvaro, who turned it over to defendant DePeri. Defendant DePeri gave Alvaro a percentage of the money to distribute to Albert Ricci and the other members of the vice squad. Sometime in early 1981 defendant DePeri told Alvaro that the protection payments were insufficient and instructed him to "increase the payroll." Joseph Alvaro passed these instructions to Albert Ricci, who carried them out by initiating more contacts with vendors and numbers operators. Defendant DePeri initiated surveys of all the poker machines in the Division to aid the conspiracy. These surveys were carried out by Police Department personnel.

Defendant DePeri also received protection payments for illegal gambling operations in the Northwest Division through defendant George Katz and unindicted coconspirator John DeBenedetto.

Appendix D—Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

The testimony at trial revealed that the Philadelphia Police Department, headed by a police commissioner and two deputy commissioners, is organized into geographic divisions, and that each division is comprised of approximately two districts. Each division is commanded by an inspector and districts are headed by captains. Assigned to each division is a vice squad, which is comprised of four plainclothes officers and a lieutenant. The vice squad reports directly to the division inspector and its officers are often known as "inspector's men." While it is the duty of every police officer to enforce vice laws as well as all other laws of the Commonwealth of Pennsylvania, primary enforcement of vice laws is carried out by the vice squads. In about January, 1984, a new unit called the Major Investigations Division was created with responsibility for, *inter alia*, the city-wide investigation of violation of vice laws.

Illegal lotteries, commonly known as numbers operations, have existed for some time in Philadelphia. The customer chooses a three digit number and places his bet, in any amount, with a numbers operator. Each day's winning number is computed in one of several ways, including a formula derived from the day's results at particular racetracks.

In around 1980, vending machine companies in the Philadelphia area began placing video poker machines in bars and taverns throughout the city. Video poker machines are coin-operated machines which "deal" the customer a hand of cards. The customer can win free games if the hand he draws beats the odds programmed into the machine. The vendor who places the machine in

the bar splits its profits with the bar owner. The machines are used for illegal gambling purposes when bar employees pay the customer in cash for the free games won. Such a use of video poker machines violates Pennsylvania law and subjects the bar owners and employees to arrest and makes the machines subject to seizure.

The evidence at trial showed that defendants and their coconspirators threatened video poker machine vendors with arrest and seizure of their machines in order to extort protection payments from them. The coconspirators also received illegal protection money from numbers operators. Defendants utilized the divisional and district organization of the Philadelphia Police Department to carry out this extortion and receipt of money.

The evidence at trial was comprised in large part of the testimony of approximately eighteen poker machine vendors and five numbers writers. Each testified to the payments he made to defendants and others and to the circumstances in which the payments were made. In addition, the government presented the testimony of Albert Ricci and Joseph Alvaro, two former Philadelphia police officers. Albert Ricci, a former vice officer in the Northwest Division, had earlier pleaded guilty to the charges against him in the first indictment returned in this case, including charges of RICO conspiracy, a substantive RICO count and extortion under color of official right in violation of the Hobbs Act. He described how the conspirators utilized their positions within the Philadelphia Police Department to carry out the

extortionate activity and the receipt of bribes, as well as the roles of many of the defendants and others in the illegal scheme. Joseph Alvaro, a former vice lieutenant at Northwest, who cooperated with the federal investigation in this case, provided similar testimony. As part of his participation in the investigation, Alvaro made tape recordings of defendants Martin, DePeri and Linso, as well as recordings of Albert Ricci and Stephen Komada, an indicted coconspirator. These tape recordings were played to the jury.

The evidence at trial showed generally a pattern of interrelated activities by the conspirators which created a climate of extortion, in which vice operators knew that payment of protection money was necessary in order to operate within the city.

The conspirators utilized their positions within the Police Department to initiate contact with poker machine vendors in one of three ways: seizure of machines located within their district; direct contact with vendors they learned had machines at locations within their district or division; and referrals by coconspirators of vendors paying protection money in other districts or divisions. When they met with the vendors, the conspirators generally advised the vendors that it would cost them a specific amount, anywhere from $25—$100 per month, per machine, to continue to operate video poker machines within their district or division. Vendors were advised that their machines would be seized and the locations harassed if payments were not forthcoming. Payments were most often made monthly, on the first or fifteenth of each month. Monies collected were generally passed up the ranks to the senior officers for distribution.

Once a particular vendor began to make protection payments, defendants would refrain and instruct other police officers to refrain from seizing machines being used for illegal gambling, or otherwise enforce Pennsylvania gambling laws with regard to the use of machines.

The collection of protection payments from numbers operators took place in a similar manner.

The conspirators generally extorted protection payments for vice operations in their own district. They would, however, collect protection payments from vendors in their districts for protection of machines in other districts and pass that money along to their coconspirators located in those districts. The conspirators also referred vendors to one another, and checked with each other regarding the trustworthiness of particular vendors.

When a conspirator was transferred from a particular division or district, he would pass to his replacement the names, locations and amounts paid by vice operators, code names and any other information necessary to enable the new officer to carry on the activities of the conspiracy.

In November 1982, when the federal grand jury subpoenaed the records in the desk of John DeBenedetto, defendant DePeri, who was no longer assigned to Northwest, instructed Joseph Alvaro to return to Division headquarters to destroy records of payoffs from poker machine vendors, which were kept in the desk of DePeri's successor, defendant Martin. Joseph

Alvaro went to Division headquarters, where he met Albert Ricci, and broke into defendant Martin's desk with the help of another officer. Alvaro removed the records in question, along with records from his own desk. Albert Ricci likewise removed from his desk any incriminating materials. Joseph Alvaro then called defendant DePeri and advised him that he had obtained and destroyed the poker machine records.

C. *Dennis Linso and George Morrell*

Defendant Dennis Linso was the Captain of the 5th Police District, which was located in the Northwest Division. He served under both defendants Martin and DePeri when each commanded Northwest.

Defendant Linso contacted poker machine vendors and asked them to come to his office at District headquarters. Defendant Linso demanded that each vendor pay him $25-$50 each month for every machine the vendor had in the 5th District, and advised the vendor that these payments were necessary even if the vendor was already making protection payments to Albert Ricci. The vendors were advised that they would be contacted on a regular basis, usually bi-monthly, by another individual, who would collect the payments.

Each vendor made payments for defendant Linso to defendant George Morrell. Defendant Morrell, a uniformed patrolman at the 5th District, was assigned to patrol the business district on Ridge Avenue. Defendant Morrell additionally initiated a contact with one vendor, who also began to make regular protection payments.

Defendant Linso also received illegal protection payments through Albert Ricci.

Defendant Morrell also received payments for the protection of a numbers operation on behalf of defendant Linso.

D. *Henry Pecic*

Defendant Henry Pecic was a vice lieutenant, who was assigned to the Northwest Division and later transferred to the North Central Police Division in March 1981.

While he was assigned to Northwest, defendant Pecic received monthly payments from Lester Barry, a numbers banker, for protection of Barry's operations in the Northwest. Defendant Pecic was transferred from Northwest after defendant DePeri became inspector there. At defendant DePeri's request, defendant Pecic provided information to Joseph Alvaro regarding protected vice operations in the Northwest Division. Defendant Pecic provided Alvaro with a list of protected locations, as well as the code name "Whitey" to use in connection with pickups.

After he was assigned to North Central, defendant Pecic extorted protection payments from one vendor for protection of poker machines. Defendant Pecic met with the vendor monthly from July through November 1982.

E. *Theodore Murphy*

Defendant Theodore Murphy was a vice lieutenant assigned to the Southwest Police Division.

Defendant Murphy contacted poker machine vendors who had machines located in Southwest and asked to meet with them. At the meetings defendant Murphy would tell the vendors that he knew they had machines in his District, and if they wished to continue to keep them there they would have to pay him protection payments monthly. The first meetings often occurred at Division headquarters at 55th and Pine Streets. Defendant Murphy would then meet with the vendors monthly, at various locations, to collect the protection payments. Defendant Murphy attempted to continue extorting protection money even after he returned from the Police Department.

Defendant Murphy also received protection payments for machines in his Division through unindicted coconspirator John DeBenedetto. Former Inspector DeBenedetto received protection payments on defendant Murphy's behalf from William Dawley.

F. *George Katz*

Defendant George Katz was a vice lieutenant and a uniformed lieutenant at the Central and North Central Police Divisions and the 35th Police District.

Defendant Katz collected protection payments from Lester Barry, a numbers banker, on behalf of defendant DePeri.

While he was assigned to Central Division, defendant Katz extorted protection payments from one vendor, William Dawley, for protection of machines in several areas of the city. After defendant Katz left the Central

Division, he continued to extort protection payments from Dawley for protection of machines in two areas of the city.

In sum, the evidence is sufficient to sustain the jury's verdict as to each defendant. Defendants' argument is therefore without merit.

4. Single conspiracy

Defendants allege that the evidence at trial was legally insufficient to prove the single conspiracy alleged in the indictment, but at best showed several different conspiracies located in different districts and divisions around the city. This argument is without merit.

An indictment may not charge multiple conspiracies in one count. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Kenny*, 462 F.2d 1205, 1216 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). "Kotteakos prohibits charging multiple unrelated conspiracies, but it does not prohibit charging one master conspiracy and establishing at trial that under the master conspiracy more than one subsidiary scheme was involved." *Kenny*, 462 F.2d at 1216 (citation omitted). Likewise, "the government without committing a variance . . . may establish the existence of a continuing core conspiracy which attracts different members at different times and which involves different sub-groups committing acts in furtherance of the conspiracy." *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978).

The evidence at trial amply demonstrated a large common scheme to extort money from numbers writers and poker machine vendors, and that members of the conspiracy helped ~~o~~ther members of the conspiracy in an effort to achieve that goal. One conspirator need not know the identities of all of his coconspirators, nor know all of the details of the conspiracy, in order to be found a knowing member of the conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). The evidence at trial showed that each defendant knew that other members of the Philadelphia Police Department in other divisions throughout the city were using their positions within the Department to extort money from numbers writers and poker machine vendors. The evidence revealed numerous connections between conspirators of different districts and divisions, as well as the conspirators' use of the organizational structure of the Department in order to carry out the conspiracy charged.[5]

First, the testimony at trial revealed that individual conspirators collected payments from vendors and numbers writers for protection throughout the division or district in which the officer worked. Additionally, there was considerable evidence that certain conspirators collected additional payments for protection in other districts and divisions throughout the city, and that conspirators utilized the organizational structure of the Department to distribute those payments to the appropriate individuals.

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[5] I do not purport to describe here all of the evidence produced at trial which is probative of a single conspiracy, but only examples of different categories of evidence.

For example, Albert Ricci testified that when he was assigned to the N.W. Division, he collected money from Joe Lamar and passed it along to defendant Linso of the 5th District. Albert Ricci also testified that he collected payments from several vendors for defendant Kelly in the East Division.

Lawrence Malloy, a former police officer in the Central Division, testified that at least two vendors paid him for protection in other divisions. He stated that he passed these payments to former Inspector John DeBenedetto for distribution to the appropriate district, and that he did not receive a percentage share of these payments as he did from the monies he collected for protection within his division.

Two government witnesses testified that they made protection payments to defendant Katz for protection in various areas of the city. Lester Barry, a numbers banker, testified to payments collected by defendant Katz on behalf of defendant DePeri. William Dawley, a video poker machine vendor, stated that he paid defendant Katz for machines in the North, Northwest and Central Divisions.

William Dawley also testified that he subsequently paid several thousand dollars each month to former Inspector DeBenedetto for protection of poker machines throughout the city. Dawley testified that about this same time defendant Murphy requested a meeting with him to discuss the machines Dawley had in the Southwest Division. Defendant Murphy asked William

Dawley about each machine's location. When Dawley confirmed that he did in fact have machines at those locations, Murphy stated that he was "just checking."

Second, the evidence at trial demonstrated that the conspirators provided assistance to coconspirators at various locations around the city in aid of the scheme alleged in two ways: individual officers "referred" vendors to officers in other districts or divisions; and certain officers provided detailed information to their successors regarding protected locations and times and places for collections.

For example, defendant Murphy called Joseph Alvaro to see if a particular vendor was "OK to talk to." Albert Ricci testified that he arranged for several vendors to meet with other coconspirators in other districts and divisions. When he was transferred to a new assignment, defendant Pecic provided Joseph Alvaro with a list of protected vice operators and their locations, as well as the code name "Whitey" to use in connection with pickups. Joseph Alvaro passed this information to Albert Ricci, and when Ricci was transferred, he provided similar information to Stephen Komada.

Third, the evidence at trial revealed that various defendants and coconspirators utilized the organizational structure of the Police Department not only as a method of distribution of illegal payments, but also as a means of inhibiting the federal investigation. These activities had a city-wide effect. For example, defendant Martin paid hush money to Albert Ricci to prevent him from telling the FBI about the conspiracy. Martin utilized his position as deputy commissioner to establish a city-wide

Major Investigations Division which was used to extort money for the payments to Albert Ricci. During one tape recorded conversation, Martin stated that he needed his position as deputy commissioner to stay informed of the federal investigative proceedings and to continue to obtain money to keep Albert Ricci from cooperating with federal authorities. The evidence showed that defendant Martin caused the Major Investigations Division to seize video machines throughout the city in order to get even with those vendors whom he believed were cooperating with federal investigators, as well as to cut short the federal investigation by showing that the Division was doing its job with regard to vice.

Finally, the testimony at trial showed that defendant DePeri, although he was no longer assigned to the Northwest Division, caused Joseph Alvaro, also no longer assigned to Northwest, to return to division headquarters to destroy poker machine records they left there. Thus, the geographic assignment of officer in the Department did not prevent them from causing acts to be carried out in other Divisions of the city.

The evidence outlined above, along with all the other evidence introduced at trial, clearly demonstrates the single conspiracy alleged.

5. Withdrawal from the conspiracy

Defendants Morrell, Pecic and Katz argue that when they resigned from the Police Department they withdrew from the conspiracy alleged as a matter of law. Defendants argue that coconspirator statements made after their respective termination dates were therefore

not admissible against them. Defendants' principal objection was directed to the coconspirator statements contained in the tape recorded conversations between Joseph Alvaro and defendants Martin, DePeri and Linso.

"Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." *United States v. Steele*, 685 F.2d 793, 803 (3d Cir.), *cert. denied*, 103 S. Ct. 213 (1982). Rather, the defendant must demonstrate withdrawal from the conspiracy by presenting evidence of some affirmative act on his part which is inconsistent with the goals of the conspiracy. *U.S. v. Gibbs*, No. 82-1096, slip op. at 14 (3d Cir. June 15, 1984). Withdrawal by a conspirator is most often shown by "either a full confession to the authorities or communication to his conspirators that he has abandoned the enterprise and its goals." *Steele*, 685 F.2d at 803-04. When a defendant has made a *prima facie* case of withdrawal from the conspiracy, the burden shifts to the government to either impeach the defendant's evidence or produce evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. *United States v. Lowell*, 649 F.2d 950, 959-60 & n.16 (3d Cir. 1981).

Defendants contend that under the facts and charges in this case resignation from the Police Department establishes withdrawal as a matter of law. Defendant Morrell notes that the Department regularly communicates to all police districts information regarding resignations of police officers by the use of teletype or computer. Defendants argue that since the object of the conspiracy charged in this case is to conduct or participate in the affairs of the Police

Department through a pattern of racketeering, resignation from the Department necessarily results in withdrawal from the conspiracy. Defendants assert that the record in this case contains no evidence of activity by them in furtherance of the conspiracy after they resigned from the department. Accordingly, defendants assert that they have established withdrawal from the conspiracy as a matter of law.

In support of their withdrawal argument, defendants rely on Chief Judge Aldisert's opinion in *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982). In *Steele*, three individuals and three corporations were convicted of conspiracy, wire fraud, mail fraud, and interstate travel in aid of racketeering. *Id.* at 797. The theory underlying the prosecution was a conspiracy to obtain a construction contract for defendant General Electric Company ("GE") to build a multi-million dollar power plant in Puerto Rico by bribing Puerto Rican public officials. *Id.* at 797-98. Defendant Naples, a "high-level employee of GE's Gas Turbine Division," appealed an order denying his motion for judgment of acquittal on the ground that he had withdrawn from the conspiracy charged as a matter of law on a date outside the statutory limitations period by resigning from his position with GE. *Id.* at 803. The court of appeals reversed his conviction, stating: "Naples presented evidence that he resigned and permanently severed his employment relationship with GE in August 1975. *In the circumstances of this case*, that was sufficient to make out a prima facie case of withdrawal . . ." *Id.* at 804. (emphasis added).

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The circumstances of this case are different from those in *Steele*. The facts in *Steele* as described by Chief Judge Aldisert do not reveal that Naples received any personal benefit as a result of his participation in the conspiracy. The only beneficiaries of the illegal scheme in *Steele* were the corporate entities, and most particularly GE, Naples' employer. The facts adduced at trial in this case reveal that the Philadelphia Police Department did not benefit from the conspiracy charged. In this case all proceeds of the conspiracy accrued to the sole benefit of the coconspirators.

Additionally, in *Steele*, Naples' continued employment with GE was a necessary prerequisite to participation in the conspiracy. Thus, resignation by Naples necessarily severed all his ties with the conspiracy and deprived the remaining conspirator group of his services. *See United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981). The evidence at trial revealed that employment in the Police Department was not necessary in order to participate in the conspiracy. The testimony at trial demonstrated that certain individuals continued to make an active role in the conspiracy following their resignation from the Department.

Specifically, George Engle, a video poker machine vendor, who paid protection money to defendant Murphy, testified that after he had resigned from the Department defendant Murphy stated that he would continue to collect monthly protection payments from Engle. When questioned by Engle regarding his resignation from the Department, defendant Murphy stated that it was "business as usual." Lester Barry,

another government witness, testified that he made monthly payments for protection of his numbers banking business to former Inspector Kenneth Schwartz after Schwartz retired from the Department. Finally, in a tape recorded conversation with Joseph Alvaro which took place long after Alvaro had retired from the Police Department, defendant Martin asked Alvaro whether he was interested in acting as a pick-up man for illegal payoffs. When questioned about this at trial, Joseph Alvaro stated that he and defendant Martin both laughed at Martin's request because they both knew that as a target of the federal investigation Alvaro was too "hot" to act as a pick-up man. Joseph Alvaro did not state that he could not act in that capacity because he no longer worked for the Police Department. There was also testimony that various coconspirators continued to discuss aspects of the conspiracy and the federal investigation with Joseph Alvaro after he retired from the Department, and did not appear to believe that his retirement severed his participation in the conspiracy.

Finally, the resignations of defendants here did not take place until after they learned that their personnel records had been subpoenaed by the federal grand jury. Thus, defendants, who each had been employed the requisite number of years by the Police Department, retired from the Department only after they learned that they were in some way subjects of the federal investigation. In these circumstances it appears that defendants' resignations were not motivated by a desire

to abandon the conspiracy and its goals, but were motivated by a desire to avoid indictment and retain their retirement benefits during the investigation period.[6]

In light of the circumstances described above, it is clear that resignation from the Police Department is not sufficient to establish a *prima facie* showing of withdrawal from the conspiracy charged. Because the defendants had not established withdrawal as a matter of law, I instructed the jury to determine as a factual matter whether any defendant had withdrawn from the conspiracy.[7] I then instructed the jury that it could not consider as evidence against any defendant who withdrew from the conspiracy any acts or declarations of coconspirators which occurred after the date of withdrawal. The jury was thus instructed that they could not consider the coconspirator statements contained on any tape recordings against a particular defendant if they found that he withdrew from the conspiracy prior to the time the recordings were made.[8]

[6] When a police officer is indicted on criminal charges he is fired from the Department. Retired police officers who are indicted retain their retirement benefits until and unless they are convicted.

[7] Interestingly, no defendant argued the matter of withdrawal to the jury, but relied instead on various other defenses.

[8] The jury was instructed:

> Regarding possible withdrawal of a defendant from the conspiracy alleged, you are instructed that once it is shown beyond a reasonable doubt that a defendant knowingly joined a conspiracy, he remains a member of the conspiracy until it affirmatively appears from the evidence that the defendant in good faith disavowed and completely withdrew from any participation in the conspiracy.

(Footnote continued on following page.)

Assuming *arguendo* that the defendants withdraw from the conspiracy upon retirement from the Police Department, they were not prejudiced by the admission of coconspirator statements contained in the tape

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(Footnote continued from preceding page.)

> An individual may withdraw or abandon a conspiracy by renunciation or by engaging in conduct which is inconsistent with the object or purpose of the conspiracy and the continued participation of the defendant as a member of the conspiracy. Mere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal. For a defendant to be deemed to have withdrawn, there must be evidence showing withdrawal by some affirmative action. Such action must consist of a definite and decisive step or some other conduct which is inconsistent with the continued participation of the defendant as a member of the conspiracy and continued adherence to the object or purpose of the conspiracy.
>
> A defendant may also withdraw from a conspiracy by notifying his alleged coconspirators of his intent to withdraw. Such notification can consist of any communication or conduct reasonably calculated to reach the other alleged coconspirators and proof of such communication does not require evidence that the defendant directly informed each alleged coconspirator of his intention to withdraw.
>
> If you find that a defendant withdrew from a conspiracy, as I have defined that concept for you, then you may not consider as evidence against him any acts or declarations of coconspirators which occurred after the date that the defendant withdrew from the conspiracy. However, I instruct you that withdrawal from a conspiracy is not necessarily a defense to a conspiracy charge. If you find that the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged, that the defendant willfully became a member of that conspiracy, and that the overt act requirement has been satisfied, then you may find that defendant is guilty of conspiracy even if he withdrew from the conspiracy prior to the time that the conspiracy ended.

See United States v. Continental Group, Inc., 603 F.2d 444, 446 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980).

recordings because such statements are easily separable from the evidence against them. The tape recordings were made approximately one year after the resignations of defendants Morrell and Katz, and defendants were not parties to the taped conversations. The hush payments by defendant Martin to Albert Ricci are also easily separable from the evidence against defendants. Defendants therefore were not prejudiced by the introduction of this evidence at a joint trial.[9]

For all these reasons, defendants' withdrawal arguments are without merit.

6. Coconspirator statements

Defendants raise various issues regarding the admission of coconspirator statements.

Defendants first assert that coconspirator statements were improperly admitted because there was insufficient independent evidence of a conspiracy and, additionally, that the statements were not in furtherance of the conspiracy.

Pursuant to *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976), and *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), I permitted the government to introduce coconspirators on the condition that the government "establish the existence of the alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence

[9] Defendant Pecic resigned from the Department on March 20, 1984, only a short time before the return of the superseding indictment. Very little evidence was introduced of events occurring after March 20, 1984.

independent of the hearsay declarations." *United States v. Continental Group, supra,* 603 F.2d at 457. On July 31, 1984, at the close of the government's case, I issued a bench opinion on this matter. In denying defendants' motions with regard to this matter, I rely on the reasons stated in that opinion, as well as my bench opinion of July 16, 1984 regarding defendants' objections to the tape recordings.

Defendants next assert that they were denied their rights under the confrontation clause of the Sixth Amendment when I permitted the government to introduce the conspirator statements of defendant Martin and unindicted coconspirator Stephen Komada. On July 25, 1984 I ruled on the confrontation clause objection raised by defendant Morrell regarding the tape recording of the conversation of Joseph Alvaro and Stephen Komada. I see no reason to change that ruling at this time.

Defendants' arguments regarding the statements of defendant Martin are also without merit. In *United States v. Ammar,* 714 F.2d 238 (3d Cir. 1983), the court stated that the confrontation clause imposes a two-prong requirement: first, the government must normally show that the declarant is unavailable, making admission of the statement necessary; and second, the statement must bear "sufficient indicia of reliability" to demonstrate its trustworthiness. *Id.* at 255, *citing Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980). It is clear that the two-prong requirement is satified in this case. First, defendant Martin's decision not to testify at trial made him "unavailable." *See Ammar,* 715 F.2d at 255. Second,

the challenged statements are contained in tape recorded conversations between defendant Martin and Joseph Alvaro. It is beyond dispute that the statements are sufficiently reliable, since they are actually the words of defendant Martin himself.

To the extent defendants rely on the rule of *Bruton v. United States*, 391 U.S. 123 (1968), their arguments are likewise without merit. In *Bruton*, the Court held that the confrontation clause of the Sixth Amendment is violated when a certain type of extra-judicial statement of a codefendant who does not testify is placed before the jury at a joint trial. 391 U.S. at 137. The *Bruton* rule is not automatically triggered whenever a codefendant's out of court statement is introduced at trial, but applies only when the admitted statement inculpates the defendants against whom it constitutes hearsay evidence. *Id.* at 124.

The tape recordings introduced by the government at trial consisted primarily of statements of defendant Martin regarding his own actions. The tapes reveal defendant Martin's concerns regarding Albert Ricci and the possibility that Ricci would provide information to federal investigators, as well as Martin's efforts to keep Ricci quiet. He also described his activities as deputy commissioner, including his plans for the newly-created Major Investigations Division, as well as his ability to obtain information regarding the federal investigative efforts.

The taped conversations are not clearly inculpatory of other defendants, nor are they crucial to the

government's case against the other defendants. *See United States v. Knuckles*, 581 F.2d 305 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

The tape recorded statements of defendant Martin therefore do not fall within the ambit of the *Bruton* rule, and their admission therefore resulted in no violation of defendants' Sixth Amendment rights of confrontation.

Finally, defendants claim that the tape recorded conversations were highly prejudicial to them because of certain statements made by defendant Martin. Defendants refer specifically to statements regarding character testimony, fees and practices of criminal defense attorneys, and his desire to end the federal investigation of the Police Department. I held extensive oral argument regarding the admission of the tape recordings prior to trial. As I stated at that time, I do not agree with the defendants' characterization of these statements contained in the recordings, and also do not find them to be unduly prejudicial to the defendants. For the reasons stated at that time, defendants' arguments are without merit.

7. Prosecutor's Remarks

Defendants Morrell, Pecic, Murphy and Katz assert that I erred in refusing to grant a mistrial because of a statement made by the Assistant United States Attorney during the testimony of defendant Dennis Linso. During his cross-examination by the government regarding certain government witnesses, defendant Linso stated that "they didn't take a polygraph like I offered to" take. Government counsel objected, stating

"[o]bjection, your honor. That's also untrue." I immediately instructed the jury to completely disregard and give no consideration to the prosecutor's remark.

Defendants suggest that the prosecutor's remark constitutes impermissible vouching for the credibility of government witnesses. This argument is without merit. While counsel is not free to go outside the evidence to vouch for the credibility of a government witness, *United States v. Roberts*, 618 F.2d 530, 532 (9th Cir. 1980), the statement by government counsel did not constitute such improper vouching. First, the government did not state or imply that its witnesses had taken polygraph examinations. Second, the statement made by defendant Linso was not responsive to the question asked of him, and was a gratuitous remark which invited the response given. Under these circumstances, the statement by government counsel was not improper. *United States v. Gabriel*, 597 F.2d 95, 101-02 (7th Cir. 1979). Additionally, I immediately instructed the jury to disregard the statement. Defendants therefore suffered no prejudice.

8. **Remarks made in jury's presence**

Defendants Morrell, Pecic, Murphy and Katz assert that I erred in permitting members of the media to speak in the presence of the jury.

Prior to their introduction into evidence at trial, I ruled that the media could not have immediate access to certain tape recordings or the transcripts provided for the jury's convenience. While one of the tapes was being played at trial, and because of my earlier ruling regarding media access, three newspaper reporters stood

and stated in the jury's presence that they were having difficulty hearing the conversations. Defendants contend that the statement made by the press constitute irrelevant and unsworn testimony, in violation of Rules 402 and 103(c) of the Federal Rules of Evidence. Defendants point specifically to the statement of one individual that the press are the "eyes and ears of the public" as being particularly prejudicial.

The defendants were not prejudiced by the brief statements made by the media. The remarks were made in a quiet and orderly fashion and were not inflammatory or prejudicial. Additionally, I instructed the jury on a number of occasions that the due process rights of defendants required that they only consider evidence properly admitted at trial, and that they could not read or listen to any media reports about the case as such reports did not necessarily comport with the procedural safeguards to due process. This was an educated jury, which could not have been unaware of the public interest in this case. The remarks of the press could not have affected them, especially in light of the circumstances in which they were made and my immediate instruction.

No prejudice inured to defendants as a result of this incident.

9. Alleged Brady Violations

Defendant Pecic contends that the government's failure to produce interviews of vendors not named in the indictment who stated that they were not victims of extortion constitutes prosecutorial misconduct under

Brady v. Maryland, 373 U.S. 83 (1963).[10] Defendant also urges that my pretrial ruling on his motion for release of *Brady* materials was erroneous. These arguments are without merit.

First, for the reasons stated therein, I will adhere to my pretrial ruling on defendant's *Brady* motion.

Second, the government did provide defendant with information regarding one vendor, whose testimony defendant presented at trial. Defendant was also permitted to question those vendors who testified at trial regarding machines they had in his District about whether they paid protection for those machines. It is not clear whether any other information of the type to which defendant refers actually exists. The fact that a vendor not named in the indictment may have stated that he was *not* a victim of extortion by defendant Pecic, however is not produceable under *Brady*, as it is neither exculpatory nor inculpatory. *United States v. Rhodes*, 569 F.2d 384, 388 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978). Moreover, such evidence is simply immaterial to the issues at trial. *See United States v. Oxman*, No. 83-1531, slip op. at 26 (3d Cir. Aug. 1, 1984).

Accordingly, defendant's arguments that a new trial is mandated under *Brady* is without merit.

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[10] My order of June 14, 1984 required that the government produce all exculpatory materials not later than June 20, 1984 and all impeachment materials not later than 20 days before the trial at which the witness would testify.

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10. Testimony of government witness Lawrence Malloy

Defendants claim that it was not error to permit the government to introduce the testimony of Lawrence Malloy.

Lawrence Malloy is a former Philadelphia police officer who was assigned to the Central Police District. Malloy was indicted and convicted in 1983 on charges regarding illegal payoffs to police officers and is an unindicted coconspirator in this case. Lawrence Malloy testified that while he was at Central Division he regularly collected and passed to Lieutenant John Smith illegal payments from numbers writers and poker machine vendors, and received a percentage share of these payments. Malloy also testified that he regularly collected payments from certain poker machine vendors for protection for machines located in areas other than center city. He stated that these payments were first cleared with Inspector John DeBenedetto, who is also named as an unindicted coconspirator in this case, and that the payments were given directly to DeBenedetto for distribution to the other Divisions in which the machines were located. Defendants claimed that they were unduly prejudiced by Malloy's testimony because he has been convicted on charges similar to some of the charges against them.

Lawrence Malloy's testimony was highly relevant, and any prejudice arising from his testimony was outweighed by its probative value. Fed.R.Civ.P. 403. Malloy's testimony established that police officers collected payments from vendors for protection of poker machines in other areas of the city. This testimony, in connection

with similar testimony of Albert Ricci and Joseph Alvaro regarding other areas of the city, was probative of the single conspiracy charged. Malloy's testimony also corroborated the testimony of several vendors that they had made illegal payments to him.

The 1983 trial had been mentioned on other occasions during the trial before Malloy testified, and was brought up by defense counsel during cross-examination. Lawrence Malloy testified that he had no personal contact with any of the defendants on trial, and that the charges on which he was convicted involved none of the defendants. Defendants were therefore not prejudiced by his testimony.

11. Testimony of defense witness Michael Taylor

Defendant Pecic contends that I improperly limited the testimony of defense witness Michael Taylor. This contention is without merit.

After hearing the offer of proof made by defense counsel with regard to the testimony of Michael Taylor, the government moved to exclude certain proffered testimony. Defendant proposed to have Taylor testify regarding a sexual incident in which he states he observed government informant, Joseph Alvaro. Defendant stated that the subsequent altercation he had with Alvaro concerning the incident caused Alvaro to be biased against him and provided Alvaro with a motive to lie about him at this trial. The government sought to exclude the testimony, arguing that it lacked probative value and violated Rule 403 due to its highly prejudicial nature.

I denied the government's motion and permitted both Michael Taylor and defendant Pecic to testify regarding this event. I directed, however, that counsel limit his question to elicit testimony about what the witnesses actually saw and heard, and not to elicit speculations about what might have occurred. This was a discretionary matter with me. *United States v. Medico*, 557 F.2d 309, 317 (2d Cir. 1977), *cert. denied*, 434 U.S. 986 (1978); Fed.R.Civ.P. 403.

Defendant was in no way limited in presenting this theory of defense. He was permitted to develop fully this incident and the issue of bias on the part of Joseph Alvaro before the jury. Defendant was not prejudiced by this ruling.

12. Election between principal and aider and abettor

The indictment in this case charged defendants in counts 8-48 with violations of the Hobbs Act, 18 U.S.C. §1951 and §2. I denied defendant Morrell's request that I require the government to elect between the charges of principal or aider and abettor with regard to the Hobbs Act charges against him. He alleges that this was error. Defendant states no legal authority for this argument.

Section 2 of Title 18 does not establish a separate criminal offense; rather, it merely establishes that an aider and abettor is properly charged as a principle. *See United States v. Provenzno*, 418 F.2d 1069, 1083 (3d Cir. 1969). Defendant was thus not entitled to the election he sought.[11]

[11] In my instructions to the jury I explained the aiding and abetting statute, as well as the elements of the Hobbs offense charged.

13. Defendant's point for charge 13

Defendants Morrell, Pecic and Katz assert that it was error to refuse to give defendant Morrell's requested point for charge 13.[12] In denying defendants' motions on this ground, I incorporate the statement of reasons I made on the record during the charge conference. I note additionally that proposed point 13 is confusing and misleading in that it does not sufficiently explain to the jury how it may consider evidence that a particular defendant acted as a courier, and that my charge as a whole properly instructed the jury regarding the elements of the offenses charged.

14. Missing witness instruction

During the charge conference, just prior to closing arguments, defendant Pecic orally requested that I give a missing witness instruction. Such a request was not part of defendant's written submission of points for charge. Defendant did not identify which witness or witnesses were missing, but stated merely that the circumstances of the trial required such a charge. Defendant contends that my denial of this request was error. This argument is without merit.

[12] Defendant's proposed point 13 stated:

> With respect to the charges in each count in which George Morrell is named as a defendant, if you, the jury, find that the acts of Mr. Morrell amount to no more than his being a "courier" or "go-fer" for another defendant, even though he was employed by the Philadelphia Police Department, and he otherwise manifested no agreement to participate in the affairs of the enterprise through a pattern of offenses as charged in the indictment, then the Government has not met its burden of proving his guilt beyond a reasonable doubt, and you must find Mr. Morrell not guilty of all charges.

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The government made known to the defendants that certain individuals did not admit that they were victims of extortion. Defendants did not call these individuals to testify at trial, nor did they advise me that they were unable to do so. In these circumstances, where it appeared that the witnesses were equally available to both defendants and the government, I do not believe it was appropriate to give the missing witness instruction to the jury, and believe that my charge as a whole properly instructed the jury how to weigh and evaluate the evidence presented. *See United States v. Montoya*, 676 F.2d 428 (10th Cir. 1982).[13]

For all these reasons, I shall deny defendants' motions.

DANIEL HUYETT, III
Daniel Huyett, 3rd, *Judge*

[13] I note that defendants argued to the jury the government's failure to produce certain witnesses at trial and the inferences they wished the jury from the absence of those individuals, despite my ruling on defendant Pecic's request.

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IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Criminal Action
No. 84-106

UNITED STATES OF AMERICA

v.

JAMES MARTIN, *et al.*

ORDER

NOW, September 12, 1984, for the reasons stated in the accompanying opinion, IT IS ORDERED that defendants' motions are DENIED.

DANIEL H. HUYETT, III
Daniel H. Huyett, 3rd, *Judge*